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DEPARTMENT OF
WATER RESOURCES

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)
)

SURFACE WATER COALITION'S JOINT OPENING BRIEF ON CHALLENGE

On Challenge from 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*

Honorable Eric J. Wildman, Presiding Judge

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COME 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 (collectively hereinafter referred to as the “Surface Water Coalition” or “Coalition”), by and through counsel of record, and pursuant to Administrative Order #1 (“AO1”) 13(c) and this Court’s August 16, 2010 scheduling order, hereby submit this *Joint Opening Brief on Challenge*. For the reasons discussed herein, the Court should reverse 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 “*Order*”).

INTRODUCTION

These subcases involve water rights for hydropower use at Minidoka and Palisades dams, operated by the United States Bureau of Reclamation (“United States” or “Reclamation”). Pursuant to these water rights, Reclamation is able to generate power for its irrigation projects in Idaho. Generating electricity is an *integral part* of the irrigation projects contemplated by the Reclamation Act of 1902. By law and contract, the right to purchase power from Reclamation is reserved for the express use of the irrigation districts that operate and maintain the reclamation projects. This electricity, sometimes referred to as “reserved power,” is purchased at the cost of production and is critical for the operation of reclamation projects.

All of the water delivered to landowners by Burley Irrigation District (“BID”), A&B Irrigation District (“A&B”) and Falls Irrigation District (“FID”) is pumped using reserved power generated at hydropower plants located on reclamation projects in southern Idaho. If generation is reduced as a result of subordinating Reclamation’s power rights, the cost of reserved power is

substantially increased – thus causing the landowners in these projects to face substantial increases in their operation and maintenance assessments.

Historically, subordination of Reclamation’s power rights at Minidoka Dam and Palisades Dam has occurred *only* under certain circumstances – i.e. when the water upstream of the power plants is necessary to fill other reclamation irrigation storage facilities – and *only* pursuant to a contract, like the Palisades Contracts. Under these contracts, those benefiting from the additional irrigation storage agreed to pay Reclamation for the loss of reserved power caused by the increased storage and subordination – the “power loss payment.” These provisions are included in the Palisades Contracts and the *Eagle Decree*.

In this case, the State and Reclamation have agreed to a remark, to the exclusion of the irrigation districts that rely upon reserved power that expands the scope of subordination contrary to the terms of the Palisades Contracts and the *Eagle Decree*. According to the remark, the senior power rights at Minidoka Dam would no longer be subordinated only to junior irrigation storage as contemplated in the Palisades Contracts. Rather, the water rights would be limited when the exercise of the hydropower rights “would result in loss of *water otherwise storable* in the reservoir system.”¹ (Emphasis added).

In addition, there is no “power loss payment” provision to compensate for the potential expansion of subordination to allow water to be stored or used for other purposes. This threatens to disrupt the power loss payment program and increase the cost of reserved power to A&B, BID, and FID. The irrigation districts entitled to reserved power from Reclamation have not approved the expanded subordination.

¹ The proposed remark is provided on pages 3-4 of the Special Master’s March 25, 2010 *Order Granting Motions for Summary Judgment & Special Master Report & Partial Recommendation*.

Given the conflict with the remarks agreed to by the State and Reclamation and the terms of the Palisades Contracts and *Eagle Decree*, Special Master Dolan wrongly granted summary judgment in these cases. Since the remark expands the prior subordination of Reclamation's power water rights without any basis, and the application of the remark is subject to varying interpretations by the State's and IDWR's witnesses, summary judgment is not appropriate in this case.

Furthermore, even though 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 *Order* 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 *Order* excuses the Director from complying with Idaho's adjudication statutes.

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 of these water rights.

STATEMENT OF ISSUES

The Coalition raises the following issues in its Challenge:

1. Whether the Special Master erred in holding that the State and Reclamation are not bound by the *Eagle Decree*, *Foster Decree* and Palisades Contracts for purposes of adjudication and remarks necessary for the 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 *Foster* and *Eagle Decrees* and significantly

expands the subordination provisions of the Palisades Contracts without the consent of the contracting parties?

3. Whether the Special Master's *Order* 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 a negotiated remark that materially differed from the Director's recommendation violates law and procedures in the SRBA?

FACTUAL BACKGROUND

I. The Minidoka Project

Congress passed the Reclamation Act on June 17, 1902 for the purpose of "the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands" in the various western states. *See* 43 U.S.C. § 391. One of the first projects to develop under the Reclamation Act was the Minidoka Project in southern Idaho. The Secretary of the Interior authorized the Minidoka Project pursuant to the Reclamation Act on April 23, 1904.² The project consisted of three dams: (i)

² The President later approved the Minidoka Project on January 5, 1911 since the Act of June 25, 1910, 36 Stat. 835, required the President's approval for further appropriations for existing projects.

Minidoka, authorized for irrigation and power; (ii) Jackson Lake, authorized for irrigation; and (iii) American Falls, authorized for irrigation and power.³

Construction of the facilities near Minidoka Dam, including a gravity distribution system on the north side of the Snake River and a canal and pumping facility on the south side of the river, began in 1904 and was completed in 1907. *See Ex. A to Affidavit of Travis L. Thompson*; HRA Report at 11 (hereinafter “*Thompson Aff.*”). Settlers on the north side of the river organized and formed the Minidoka Irrigation District and settlers on the south side organized and formed the Burley Irrigation District. Since delivery of water to higher lands on the south side was dependent upon pumping water, Reclamation developed the power plant at Minidoka Dam for that purpose. *Id.* The first units were put into service in 1909 for the purpose of supplying power to the south side pumping facilities. *Id.* at 12; *Affidavit of Randy Bingham* at 2-3, ¶ 4.

Later, the North Side Pumping Division of the Minidoka Project (A&B Irrigation District) was authorized and constructed by Reclamation in the 1950s and 1960s. *See Affidavit of Dan Temple* at 3-4, ¶ 8. Similar to the south side project, the North Side Pumping Division relied upon power to pump surface water from the Snake River and ground water from a number of deep wells on the project. *See Temple Aff.* at 4, ¶ 9. In addition to the Pumping Division, Reclamation also authorized and constructed the Michaud Flats Project (Falls Irrigation District) near American Falls, Idaho in the 1950s. *See Affidavit of Terrell Sorensen* at 2, ¶¶ 3-4. Like the North Side Pumping Division, the Michaud Flats Project relies upon power to pump surface water from the Snake River as well as ground water from deep wells on the project. *Id.*

³ On September 20, 1935, the Island Park and Grassy Lake Dams were authorized for irrigation as part of the project.

II. Power Water Rights at Minidoka Dam

Reclamation acquired water rights 1-217 and 1-218 for the purpose of generating power at Minidoka Dam through the *Twin Falls Canal Company v. Charles N. Foster et al.* (“*Foster Decree*”) proceeding. The Twin Falls County District Court entered a decree on June 20, 1913 and identified Reclamation’s water rights as follows:

That the defendant, the Secretary of the Interior of the United States, and his successors in office is hereby awarded the use of the water of the natural of Snake River at Minidoka Dam for power, light, manufacturing, and pumping purposes in the following amount and from the following date: 2,500 second feet from June 15, 1909, and 200 second feet from July 1, 1912, said water to be returned to the Snake River below Minidoka Dam after being used for said power purposes, and hereby designated as Right No. 9.

See Ex. B to *Thompson Aff.*; *Foster Decree* at 10.

Water rights 1-217 and 1-218 at the Minidoka power plant were not “subordinated” in any way in the *Foster Decree*. These water rights were later reaffirmed in the *Eagle Decree*:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the rights hereinafter decreed shall be supplemental to the decrees entered in the cases of Woodville Canal Co. v. Clark & Edwards Canal & Irrigation Company, et al., in the District Court of the United States for the District of Idaho, Eastern Division, on June 25, 1929, Twin Falls Canal Company v. Charles N. Foster, et al., in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Twin Falls, on June 20, 1913, Rexburg Irrigation Company, et al. v. Teton Irrigation Company, et al., in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Fremont, on December 16, 1910, and said Decrees and the Findings of Fact and Conclusions of Law upon which they are based are binding upon an plaintiffs herein.

Ex. E to *Affidavit of David I. Stanish*; *Eagle Decree* at 1.

As the demand for power on the Minidoka Project increased, Reclamation expanded the capacity of the power plant at Minidoka Dam in 1927 and again in 1942. Reclamation filed beneficial use statutory water right claims for water rights 1-4024 and 1-4025 to cover the

increased generating capacity on March 27, 1980. These water right claims were filed pursuant to Idaho Code § 42-243 and were later re-claimed in the SRBA.

III. The Palisades Project and Power Water Rights / Palisades Contracts

On December 9, 1941, the Secretary of the Interior authorized the Palisades Project pursuant to the Reclamation Project Act of 1939, 43 U.S.C. § 485 *et seq.* The project was reauthorized for irrigation, power, flood control, and fish and wildlife purposes by the Act of September 30, 1950. 64 Stat. 1083. Importantly, power generated from the project was set aside for purposes of the A&B and Falls Irrigation District projects. *See Ex. C to Stanish Aff.*

Reclamation acquired a storage water right (1-2068) for irrigation and power purposes at Palisades through a license issued by IDWR on March 19, 1973. Reclamation later filed a statutory beneficial use claim to the Snake River, 1-4054, for power plant operations on June 19, 1983. Reclamation re-filed both water right claims in the SRBA.

In the early planning stages of the Palisades Project there was a concern that the exercise of the senior hydropower water rights at Minidoka Dam (1-217 and 1-218) would impair – or possibly prevent – the ability to fill Palisades Reservoir and generate power at Palisades Dam. Tr. P. at 100-01. Seeking to resolve these concerns, Reclamation entered into agreements with most water users in the Upper Snake River Basin, including all Surface Water Coalition members, in order to increase water availability for irrigation storage at Palisades. These agreements were expressly confirmed in the “Palisades Contracts.” *See Ex. A to Bingham Aff.; Temple Aff.* ¶¶ 11-14. In order to accommodate the new reservoir at Palisades, these agreements, based on good and valuable consideration, required a shift in some of the historical irrigation and management practices of the irrigation entities throughout the Upper Snake River Basin. The district courts approved these contracts in the *Eagle Decrees* and described the system

established to ensure there was sufficient water to fill the Palisades Reservoir as being part of a “a scheme or plan for the administration of the Snake River.” Ex. E to *Thompson Aff.* (*Findings of Fact* at 11).

Critical to the “common plan” or operation of the Snake River reservoirs is the power loss payment program established through the Palisades Contracts and approved in the *Eagle Decree*. See *Temple Aff.* ¶¶ 13-14; *Sorensen Aff.* ¶¶ 5-6. Through that program, Reclamation sought to increase water for irrigation storage 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* (1-217 and 1-218). *Id.*

The revenue from the sale of winter power generation allows those reclamation projects that acquire reserved power at the cost of production from Reclamation to deliver water to over 150,000 acres at reasonable rates. See *Bingham Aff.* ¶ 11, *Temple Aff.* ¶¶ 15-17; *Sorensen Aff.* ¶ 10. However, by storing more water in the reservoir system for irrigation purposes, there would be less power generated at the Minidoka Dam facility in the winter – leaving those entities that rely upon reserved power with substantial increases in power costs, without compensation, and thus resulting in increased costs for water to every landowner within these reclamation projects.

In order to compensate for the loss of power production caused by the new subordination requested by Reclamation, resulting in increased cost of power production, all spaceholders in upstream reclamation reservoirs who received the benefit of the increased irrigation storage agreed to pay Reclamation for the loss of power production – thereby insuring that subordination of the senior power rights at Minidoka Dam in the limited manner provided would not increase the cost of production of power. See *Bingham Aff.* ¶¶ 7-9, *Temple Aff.* ¶¶ 13-14; *Sorensen Aff.* ¶¶ 5-6.

Reclamation described the operations as agreed to in the Palisades Contracts in its *Status*

Report Workings of Palisades Water Savings Agreement issued on August 5, 1968:

The compromise involved these principal points: (1) the elimination by the water users at their own expense of winter diversions in order to conserve water for storage in Palisades and American Falls Reservoirs; (2) ***the curtailment of the use of water for power generation at Minidoka Dam for the financial account of the Minidoka Project to conserve additional water for storage in American Falls, Island Park, and Palisades Reservoirs***; (3) the coordinated operation of the reservoir system for maximum storage water yields; (4) the establishment of uniform storage holdover privileges in all reservoirs; (5) a permanent exchange of contract storage rights between American Falls and Jackson Lake Reservoirs to reduce storage delivery losses; (6) the distribution of American Falls Reservoir space as follows: 315,000 acre-feet to existing lessees, 47,593 acre-feet to the North Side Pumping Diversion of the Minidoka Project, and 71,000 acre-feet to the Michaud area; (7) the recognition of existing rights to the diversions made during periods of flood flow; (8) the commitment of Palisades users to allow that reservoir to be pooled with the next 300,000 acre-feet of storage added to the system; and (9) the clarification of storage and diversion rights in connection with American Falls Reservoir.

...

Over 50 contracts, generally referred to as the "Palisades Contracts," were negotiated over a period of several years. In addition to the annual water saving of 135,000 acre-feet, established as a prerequisite to the beginning of construction of Palisades Dam, these contracts provide a basis for possible maximum annual savings of 276,000 acre-feet by curtailment of winter diversions by canals diverting at Milner Dam.

...

The Palisades contracts have a third water saving feature. ***These contracts provide for limiting the use of water for power generation at American Falls and Minidoka Dams below the amounts that would accrue to rights for power production at these two dams. Such curtailment will result in a loss of generation of units 1 to 6 of that powerplant but will result in saving of water for storage for irrigation use.*** The water so saved is credited to American Falls, Island Park, and Palisades Reservoirs. ***In compensation for such losses in power generation, replacement power is provided to the Minidoka power system, and, based on a moving average of the net annual amount of replacement power and energy required, the costs thereof are charged to the beneficiaries of the resultant water saving and the financial benefit is credited to the water users of the Minidoka Project.*** This provision for sharing the cost by water users actually benefited provided an equitable solution to a long-standing controversy.

Ex. A to *Jarvis Aff.* (*Status Report* at 2-5) (emphasis added).

IV. Irrigation Districts in the Minidoka and Palisades Projects and Reliance Upon Reserved Power Generated by Reclamation.

A. Burley Irrigation District

Burley Irrigation District is an irrigation district organized by landowners in Cassia County for the purpose of securing water from Reclamation's Minidoka Project. *See Bingham Aff.* at 2, ¶ 3. In addition to Jackson and Minidoka Dams, Reclamation constructed the Minidoka Project South Side Canal ("Main Canal"), the pumping plants, and the main canals and laterals that deliver water to lands within the district in the early 1900s. *Id.* The Minidoka power plant was built for the purpose of supplying power to BID so that it could pump and deliver water to its landowners. *Id.* at 2-3, ¶ 4.

BID entered into its first contract with Reclamation on December 5, 1924. Later, BID entered into another contract with Reclamation concerning storage capacity in American Falls and Palisades Reservoirs and related matters, Contract No.14-06-W-48. *See Ex. A to Bingham Aff.* BID relies upon power produced by Reclamation at the Minidoka Dam power plant and other interconnected federal facilities in order to pump and deliver water to its landowners that irrigate approximately 47,000 acres. *See Bingham Aff.* at 5, ¶ 11. BID pumps water from its Main Canal through a series of three lifts, or pumping plants in order to deliver water to nearly all lands⁴ within the district. *Id.* at 2-3, ¶ 4. BID also uses power to pump water from eight drain pumps and nine shallow sump wells throughout the district. *Id.*

BID's power costs are directly related to the amount of power Reclamation is able to generate at the Minidoka Dam power plant and its other integrated facilities. *See Bingham Aff.* at

⁴ Only about 640 acres within the district are delivered water directly from the Main Canal and do not rely upon BID's pumping plants.

4-5, ¶¶ 9-10. BID's power costs have increased dramatically in recent history, from \$125,328 in 1985 to \$706,241 in 2008, an increase of nearly 600% in a little over 20 years. *Id.* at 5, ¶ 11. Since BID relies upon power generated by Reclamation, any reduction in that generation at Minidoka Dam, including by reason of a new subordination of Reclamation's water rights, is likely to have a significant impact on the cost of power to BID. *Id.* at 5, ¶ 12. This would force BID to pay more in annual operation and maintenance expenses and would therefore negatively impact the district's landowners. *Id.* BID has never agreed with Reclamation's proposed subordination of the water rights for power production at Minidoka Dam that is not set forth in the Palisades Contract. *Id.* at 5, ¶ 13.

B. A&B Irrigation District

A&B Irrigation District is an irrigation district previously organized by landowners in Jerome and Minidoka Counties for the purpose of securing water from Reclamation and to operate and maintain the district's water delivery facilities. *See Temple Aff.* at 2, ¶ 3. The A&B project is also known as the Northside Pumping Division of the Minidoka Project. Reclamation conducted various studies and investigations in regard to the development of the North Side Pumping Division from 1918-1921 and later on, including eventual studies for authorization and construction of Palisades Reservoir. *Id.* at 2, ¶¶ 4-5. The North Side Pumping Division of the Minidoka Project was approved on September 30, 1950 (65 Stat. 1083) by the United States Congress, for construction under the provisions of the Reclamation Act of 1902. *Id.*

Reclamation constructed the North Side Pumping Division in the 1950s and 1960s. The project included a pumping plant on the Snake River, a discharge line to the main canal, numerous laterals and relift pumps to provide surface water to the district's landowners, as well as over 170 wells and their associated pumping equipment and additional laterals to provide

groundwater to the district's landowners. *See Temple Aff.* at 3-4, ¶ 8. A&B assumed operation and maintenance responsibilities of the project from Reclamation on March 1, 1966. *Id.*

A&B completely relies upon its pumping facilities (Snake River pumping plant and 188 individual groundwater wells) to deliver water to all landowners within the district. *Id.* at 4, ¶ 9. Because A&B must pump water in order to deliver water to all lands within the district, A&B requires a source of electric power which is provided by Reclamation. Reclamation reserves power for A&B from the southern Idaho power pool consisting of power plants constructed at various facilities in southern Idaho, including Minidoka Dam. *Id.* at 4, ¶ 10.

A&B entered into a repayment contract with Reclamation on February 9, 1962. *See Temple Aff.* at 4, ¶ 11. Pursuant to Article 28, part of the power generated at the Palisades Dam hydropower plant is set aside in perpetuity for the benefit of A&B. *Id.* at 4-5, ¶12.

The rates charged to A&B and other reclamation projects are based on the cost of production from all interconnected plants. *See Temple Aff.* at 5, ¶ 13. Pursuant to Article 19, it is the stated objective of the United States, in the operation of the Minidoka power plant, to curtail the release of additional water from American Falls Reservoir for power production at the Minidoka Powerplant during the storage season of any year whenever operation of that power plant to the full extent of its respective water rights for power production would result in "loss of irrigation water otherwise storable in the reservoir system." *Id.* To offset the resulting losses in power production Reclamation must deliver replacement power and energy into the Minidoka power system at the Minidoka power plant. Payment for this replacement power and energy must be made by all spaceholders in Palisades Reservoir, Island Park Reservoir and American Falls Reservoir, including A&B, that benefit from the water savings. *Id.*

Power costs for Reclamation's reserved power provided to A&B have increased from \$237,616.00 in 1972 to \$2,317,108 in 2008. *Id.* at 7, ¶ 16. The cost per kilowatt hour has risen from 2.35 mills in 1972 to 22.80 mills in 2008. *Id.* Any unilateral subordination of the power water rights, as proposed by Reclamation in these subcases, will likely result in power losses that are not recoverable, resulting in greater power rates for A&B. *See Temple Aff.* at 6, ¶ 15. Such power losses are likely to have a significant impact on the cost of power to A&B, which will force A&B to pay more in annual operation and maintenance expenses and will negatively impact the district's landowners. *See Temple Aff.* at 7, ¶ 17. A&B has never agreed with Reclamation's proposed subordination of the water rights for power production at Minidoka Dam that are not set forth in its contract with Reclamation. *Id.* at 7, ¶ 18.

C. Falls Irrigation District

Falls Irrigation District is an irrigation district formed by the landowners who own land within the district for the purposes of operating and maintaining the reclamation project within its boundaries constructed by Reclamation. *See Affidavit of Terrell Sorensen* at 2, ¶ 3. The project is known as the "Michaud Flats Project, Idaho" and consists of a pumping plant on the Snake River, deep wells and pumps, and canals and laterals to deliver that water to the landowners. *Id.* ¶ 4. Because of the need to pump all water used to irrigate the lands within the district, FID requires a source of electric power which is provided by Reclamation. *Id.*

FID entered into a repayment contract on behalf of the landowners with Reclamation on December 9, 1955 and an Amendatory and Supplemental Contract with Reclamation on September 15, 1964. This contract is often referred to as a "Palisades Contract" and was approved and affirmed in the *Eagle Decree*. *Id.* Under Article 27, out of the power and energy to be generated in the Palisades power plant, there is set aside in perpetuity for the benefit of

FID, that power and energy required to pump and deliver water to the lands of the District, with the right in the United States to provide from other sources an amount of power and energy in lieu of all or any part of that so set aside. *Id.* at 2-3, ¶ 4.

The rates charged to FID and other reclamation projects are based on the cost of production from all interconnected plants. *See Sorensen Aff.* at 3, ¶ 5. Under Article 18, it is the stated objective of the United States, in the operation of the Minidoka power plant, to curtail the release of additional water from American Falls Reservoir for power production at the Minidoka Powerplant during any storage season when operation of that power plant to the full extent of its respective water rights for power production would result in a “loss of irrigation water otherwise storable in the reservoir system.” *Id.* To offset the losses in power production under this Article, the United States will make replacement power available by the delivery of power and energy from other reclamation power plants into the Minidoka power system at the Minidoka power plant. Payment for this replacement power and energy must be made by all spaceholders in Palisades Reservoir, Island Park Reservoir and American Falls Reservoir, including FID, who benefit from the increased storage as a result of the curtailment.

No other Articles in the Palisades Contract authorize the United States to subordinate its power water rights to any other water rights or for any purpose other than storage for irrigation water as provided in the contract. *See Sorensen Aff.* at 3, ¶ 6. For the United States to subordinate its power rights in this subcase would result in power losses that are not recoverable, thereby increasing the power rates for FID and other reclamation projects in southern Idaho. *Id.*

Falls Irrigation District is a relatively small irrigation district. It includes approximately 11,550 acres of irrigable land. *See Sorensen Aff.* at 5, ¶ 10. Power costs incurred by the district have increased from \$109,071.00 in 1989 to \$272,316.00 in 2008. *Id.* The cost per kilowatt

hour has risen from 2.350 mills in 1972 to 22.80 mills in 2008. Any reduction in power production at any of the integrated power plants of Reclamation will have a significant effect on the cost of power to FID and will impact the district's ability to repay to Reclamation the district's share of construction costs for the project. *Id.* All of these costs are ultimately paid by the landowners of the District. Subordination of the water rights of Reclamation for power production to any other uses above the Minidoka Powerplant that are not set forth in the Palisades Contract is not authorized and has never been agreed to by FID. *See Sorensen Aff.* at 5, ¶ 10.

V. The Eagle Decree (Burley Irrigation Dist. et al. v. Eagle)

After Reclamation entered into the Palisades Contracts and construction of the reservoir was completed, water users to the Snake River above Milner Dam initiated an adjudication in the Twin Falls County District Court. The plaintiffs, Burley Irrigation District et al., filed suit against Henry Eagle, the Watermaster for Water District No. 36 (now Water District 01). All parties stipulated and agreed that prior decrees to the Snake River, namely the *Rexburg Irrigation Co. et al. v. Teton Irrigation Co. et al.* decree, the *Twin Falls Canal Company v. Charles N. Foster* decree, and the *Woodville Canal Company v. Clark & Edward Canal and Irrigating Company et al.* decree were "binding on all parties" to the proceeding. *See Ex. C to Thompson Aff.*; Complaint at 2. The plaintiffs sought to establish additional water rights to the Snake River, "over and above all other water rights . . . with a priority date of April 1, 1939". *Id.*; Complaint at 3. In addition, the plaintiffs identified the contracts entered into with Reclamation, including specific paragraphs from those contracts, and further alleged the contracts were to "govern the rights of the parties hereto in and to the waters of the Snake River

and its tributaries”. *Id.*; Complaint at 24-25. The plaintiffs recognized the following with respect to those contracts:

Plaintiffs allege that the contractual provisions set forth in paragraphs II, A, B, C, and D above, are binding upon the plaintiffs hereto and the plaintiffs accept and recognize that their respective rights in and to the waters of the Snake River and its tributaries are subject to the terms and conditions of said contractual provisions.

See Ex. C to Thompson Aff.; Complaint at 27.

On May 14, 1968, the plaintiffs entered into a Stipulation regarding certain facts and conclusions for purposes of entry of the decree. *See Ex. D to Thompson Aff.* In the Stipulation the plaintiffs acknowledged the water rights acquired by each entity or person and the cooperation, planning, and adjustment of rights related to the construction and future operation of Palisades Reservoir, as well as other project operations in the water district. Following the filing of the Stipulation, and the entry of a disclaimer of any interest by the Watermaster, Henry Eagle, Judge Theron Ward of the Twin Falls County District Court issued the *Eagle Decree* (Supplemental Decree) and his *Findings of Fact and Conclusions of Law* on July 10, 1968.⁵ *See Ex. E to Stanish Aff.*; *Ex. E to Thompson Aff.*

In his *Findings of Fact and Conclusions of Law*, Judge Ward found the following:

(a) Plaintiffs herein have over a period of many years, cooperated, planned and worked for a common fair, equitable and just plan designed to result in the most efficient, fair and complete beneficial use of all the waters of the Snake River and its tributaries.

⁵ Prior to the issuance of the decree, notice of the pendency and purpose of the action was published for 3 weeks in newspapers of general circulation in the Idaho counties of Power, Cassia, Minidoka, Twin Falls, Jerome, Blaine, Gooding, Lincoln and Elmore, and all provisions of the statute relating to notice and publication of notice were complied with. *See Ex. E to Thompson Aff.*; Findings of Fact at 2. Notice of the pendency of the companion case filed in Fremont County was also published in various counties in eastern Idaho as well to comply with the requirements of I.C. § 42-1405.

The notices filed for purposes of the Twin Falls County case advised all affected persons in those counties of the proposed water rights to be decreed and “[t]hat this cause will be brought on for hearing in open court at 2:00 o’clock P.M., on the 20th day of March, 1967, at which time any party interested may appear and defend against said rights as above set out.”

(b) Such cooperative planning and adjustment of rights, then, present and future, became and was particularly necessary prior to, and in connection with the planning for the Palisades Reservoir, the securing of Congressional authorization and appropriation for said reservoir and the irrigation projects related thereto and authorized in connection therewith, including particularly, but not limited to, the irrigation project, known as the Minidoka North Side Extension, hereinafter particularly described as being owned and operated by A&B Irrigation District.

* * *

(h) As a necessary condition to the authorization, financing, and construction of the Palisades Reservoir, it was decided that there should be certain savings of winter water to be accompanied by cessation of winter deliveries and with accompanying added storage privileges for the users ceasing such diversion and that this would be needed to be accomplished by proper contracts with the Bureau of Reclamation, which contracts have been executed.

(i) It was further known that it would be necessary to have proper contract provisions to afford the best and most economical use of the waters of the river for storage, both temporary and permanent in the various reservoirs and for mutually compatible, beneficial and non-conflicting uses for power and irrigation, and contract provisions designated to accomplish these purposes have been agreed upon and incorporated into contracts.

(j) All of the individual contracts entered into between parties Plaintiff and the Bureau of Reclamation, Department of the Interior, United States of America, were and are designed to be mutually binding upon all parties entering similar contracts, and to be construed together in effect as one overall contract with respect to the common paragraphs therein relating to savings of winter water and accompanying special storage rights; consent to exchanges of American Falls and Jackson Lake storage rights and to the redefinition of those storage rights; temporary storage and exchange of water and releases for power production; and consent to the priority of certain existing and future water rights at Island Park Reservoir and American Falls Reservoir and future reservoirs to be constructed.

(k) Since the execution of the Palisades contract, the operation of the dams, diversion and distribution works of the parties Plaintiff and of the Bureau of Reclamation, Department of the Interior, United States of America has conformed to the general scheme or plan set out herein and has recognized the priorities set out herein.

Ex. E to *Thompson Aff.*; Findings of Fact at 3-5.

Finally, with respect to the contracts entered into between the plaintiffs and Reclamation,

Judge Ward found as follows:

The contracts between the individual parties and the United States of America, Bureau of Reclamation, and the Memorandum of Agreement between the Bureau of Indian Affairs and the Bureau of Reclamation are valid and binding upon the parties thereto, and constitute a scheme or plan for the administration of the Snake River and as such, are binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries above Milner Dam.

Id.; at 11.

A companion case with the same parties to the Twin Falls County District Court case was filed in Fremont County to cover Snake River water users above Blackfoot. *See* Ex. F to *Stanish Aff. (Aberdeen-Springfield Canal Company et al. v. Henry Eagle* (Idaho 7th Dist. Ct., March 12, 1969).

Reclamation actively participated in the *Eagle Decree* proceedings through consultation with the plaintiff water user entities. As demonstrated in the letters from the Field Solicitor William Burpee to counsel for various plaintiffs, John Rosholt, Reclamation requested, reviewed, and commented on the Complaints filed by the plaintiffs in both the Twin Falls County and Fremont County adjudications. *See* Exs. F, G, H, I to *Thompson Aff.* By letter of September 9, 1967, Reclamation even requested language to ensure the Palisades Contracts it had entered into with various water users would be ratified in total by the Court. *See* Ex. I to *Thompson Aff.*; Burpee 09/06/1967 letter to Rosholt. Finally, the plaintiffs agreed to amend the exhibits attached to the *Eagle Decree* at Reclamation's request. *See* Ex. J to *Thompson Aff.*; Rosholt 9/09/1968 letter to Burpee.

Recognizing the "adjustments" in the existing decrees and operations of the river that needed to be made to accommodate the construction and use of Palisades Reservoir, Reclamation

sought to have the contracts ratified in district court, even though Reclamation was not a named party to the two cases. Accordingly, it is clear that Reclamation participated in the *Eagle Decree* cases with the Plaintiff water user entities.

VI. Course of Proceedings

The Director's Report for Reporting Area basin 01 Part 2, which included Reclamation's power water rights in these subcases, was filed with the SRBA District Court on December 19, 2006. *Supplemental Report* at 2.⁶ As originally recommended, each of the water rights contained the following remark – the so-called “historical practices” remark:

The appropriator shall exercise this right in a 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.

Id.

In April 2007, Reclamation and the Coalition members each filed *Objections* to the Director's recommendations, asserting, in part, that the historical practices remark should be “stricken” from the water rights. According to Reclamation:

The remark under the priority date seeks to subordinate this water right to all past, present, and future non-hydropower water rights on the basis of historical practice. ***Because this water right has never been historically used or administered under such a limitation, the remark is without factual or legal basis and represents an unwarranted limitation on the water right.***

Reclamation Objection at 3 (emphasis added).

On January 25, 2008, the Presiding Judge issued its *Order Setting Deadline for I.R.E. 706 Reports/Notice of Scheduling Conference*, asking IDWR to provide a basis for its inclusion of the

⁶ The *Supplemental Director's Report Regarding SRBA Subcase Nos. 1-217, 1-218, 1-2064, 1-2068, 1-4024, 1-4025, and 1-4054* (the “*Supplemental Report*”) was filed with the SRBA Court in April, 2008.

historical practices remark. In April, 2008, the Director issued the *Supplemental Report*, concluding that Reclamation's historical practices evidenced subordination of the power rights.

Following the *Supplemental Report*, Reclamation and the State of Idaho began negotiating a settlement to Reclamation's objection. Although all parties to the subcases, including the Coalition members, participated in court ordered mediation sessions, no settlement was reached with all parties. However, despite not reaching an agreement with the Coalition, in August 2009, the State and Reclamation filed motions for summary judgment, seeking to replace the historical practices remark recommended by IDWR with a new remark that had been solely agreed to by the State and Reclamation.

For water rights 01-217 and 01-218, the new remark states in part:

While the United States has the privilege to use 2,700 cfs for the development of power under water right nos. 01-217 and 01-218, it will be the objective of the United States in the operation of the Minidoka power plant to limit the exercise of water right nos. 01-217 and 01-218 for power production at the Minidoka power plant whenever operation of the Minidoka power plant to the full extent of these water rights for power production would result in loss of water otherwise storable in the reservoir system.

See Order at 3.

The proposed remark for the remaining water rights contained a similar subordination to "water that would be stored in the reservoir system." *See id.* at 3-4.

On November 3, 2009, the Coalition and Idaho Power Company submitted their joint opposition to the summary judgment motions. Following a hearing on the motions, the Special Master issued his *Order Granting Motions for Summary Judgment and Special Master Report & Partial Recommendation* on March 25, 2010. On April 28, 2010, the Coalition filed a *Joint Motion to Alter or Amend*. The Special Master issued his *Order Denying Joint Motion to Alter or Amend* on July 29, 2010. The Coalition filed their *Notice of Challenge* on August 12, 2010.

STANDARDS OF REVIEW

I. Notice of Challenge

This Court recently stated the standard of review on a challenge as follows:

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p.18.

The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodward*, 124 Idaho 531, 534 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

Memorandum Decision & Order on Challenge, Subcase No. 63-32533 (Apr. 21, 2010), pp. 3-4

II. Summary Judgment Motions

Summary judgment is appropriate if the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497 (2005). Where the action is to be tried before the court, the judge need not draw inferences in favor of the nonmoving party, but is then free to arrive at the most probable inferences based on the uncontroverted evidence. *Id.* If there are no material facts in dispute, the court may enter judgment in favor of the party who is entitled to prevail as a matter of law. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310 (Ct. App. 1982). However, if the facts are such that reasonable persons could reach differing results, summary judgment is improper.

Sirius LC v. Erickson, 156 P.3d 539, 542 (Idaho 2007). Moreover, summary judgment is not proper where the depositions and affidavits raise any question as to the credibility of witnesses. *Athay v. Stacey*, 128 P.3d 897, 905 (Idaho 2005).

ARGUMENT

The *Eagle Decree* proceedings were initiated to adjudicate supplemental water rights (April 1, 1939 priority) and to confirm the contracts entered into for purposes of allowing the construction of Palisades Reservoir. The Palisades Contracts and the *Eagle Decree* created a “common plan for administration of the Snake River”. Ex. E to *Stanish Aff.*; *Eagle Decree* at 19. The contracts were necessary so that water could be made available to store in the newly constructed Palisades Reservoir. As recognized by Reclamation, the *Eagle Decree* was necessary to effectuate the operations identified in the contracts:

It was recognized in the negotiations that led to the water savings and exchange arrangements necessary for the construction of Palisades Reservoir that these arrangements would require adjustments in the court decrees that govern the distribution of water in the Upper Snake River Valley, Water District 36. All the water users agreed to the arrangements on the basis that this would be accomplished and that all the compromises agreed to in the negotiations would be included in the resulting court decree.

Ex. A to *Jarvis Aff.*; Status Report at 6.

The *Eagle Decree* court “ratified, confirmed, and approved” the Palisades Contracts and specifically highlighted provisions regarding operations of the reservoirs. *Id.* Importantly for these subcases, the Court affirmed the contract provisions governing winter operations at the Minidoka power plant and the release of Jackson Lake and Palisades water for power production. See Ex. E to *Stanish Aff.*, *Eagle Decree* at Exs. C, E.

Despite the plain language in the *Eagle Decree*, Special Master Dolan wrongly concluded that “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.” *Order* at 12. The *Order* provides no support for this conclusion other than the testimony of a former Director who said he had never heard of the term before the week of his deposition in October, 2009. *Id.* To the contrary, the *Eagle Decree* did adjudicate a “common plan” of administration which included the specific subordination of the power water rights at Minidoka in exchange for “power loss” payments by those who benefitted from increased irrigation storage. The *Order* misinterprets the *Eagle Decree* and the binding effect of its terms on all water users in the Upper Snake, including Reclamation and the State’s Watermaster of Water District 01. Consequently, the *Order* wrongly granted summary judgment on the remarks proposed by the State and Reclamation.

I. The Special Master’s *Order* Ignores the History of the Power Water Rights and Reclamation’s Prior Agreements Relating to the Rights.

As explained above, irrigation districts in the Minidoka Project rely upon power generated at Reclamation facilities to pump and deliver water to their respective landowners. Without this power, the districts could not deliver water to their landowners for irrigation use. In addition, without the irrigation projects Reclamation would have no power facilities or water rights at those facilities.

With respect to the Minidoka power plant, Reclamation adjudicated its two senior power water rights 1-217 and 1-218 through the *Foster Decree*. See Ex. B to *Thompson Aff.* The water rights were not subordinated by the Court in any way. Indeed, at that time, the constitution did not allow for such subordination:

Sec. 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, *shall never be denied*. Priority of appropriation shall give the better right as between those using the water ...

P.U.C. v. Natatorium Co., 36 Idaho 287 (1922) (quoting IDAHO CONST. art. XV, § 3). This provision was amended in 1928 to read: “The right to divert and appropriate the unappropriated

waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.” *Fremont Madison Irr. Dist. & Mitigation Group v. IGWA*, 129 Idaho 454, 455 (1996) (emphasis added). In other words, at the time when the rights were decreed, the constitution did not permit the State of Idaho to subordinate Reclamation’s senior power water rights at Minidoka Dam. Likewise, absent clear language, the State has no authority to retroactively apply the law and diminish these water rights. *See e.g.* Idaho Code § 73-101 (“No part of these compiled laws is retroactive, unless expressly so declared”); *Gailey v. Jerome Cty.*, 113 Idaho 430, 433 (1987) (“In the absence of an express declaration of legislative intent that a statute apply retroactively, it will not be so applied”).

Accordingly, decreed water rights 1-217 and 1-218 carry a presumption into the SRBA for purposes of the Director’s recommendation, and the Director cannot change the priority element through a new blanket subordination in the SRBA. Stated another way, the Director had no authority to unilaterally subordinate a prior decreed water right that was not subordinated by the terms of the prior decree.

Following the issuance of the *Foster Decree*, at least in the 1920s and 1930s, Reclamation exercised the priority of its power water rights in the winter at the Minidoka power plant:

In the late 1920s and early 1930s, drought conditions reduced both the amount of water flowing to the Minidoka Project from the Snake River and water levels in the American Falls storage reservoir. The water shortages led to severe crop losses, especially in 1934, as not enough water was available in the late summer for irrigation. ***Part of the problem was that in the winter, operators released 225,000 acre-feet of water from the American Falls Reservoir in order to keep the Minidoka power plant and the Idaho Power Company’s American Falls plant operating.***

See Ex. A to Thompson Aff.; HRA Report at 72 (emphasis added).

In response to these drought conditions and the need to store water for summer irrigation use on the Minidoka Project, Reclamation entered into a contract with Idaho Power Company on October 1, 1934 to allow more water to be stored in American Falls Reservoir during the winter and to supplement power to the Minidoka Project:

Realizing the seriousness of the situation, the Bureau of Reclamation developed a way to supplement power on the Minidoka Project while also storing winter water for summer use. . . . The parties agreed that Idaho Power Company would shut down its American Falls plant in the winter, and then give the Minidoka Project as much as 4,000 kilowatts of firm power during the irrigation season. Throughout each winter, the company would also provide up to 10,000 kilowatts to supply the project's needs. This would allow the Minidoka plant to be idle during part of the winter, thereby preserving water for irrigation use. In exchange, the government promised the Idaho Power Company all of the surplus energy produced at the Black Canyon power plant on the Boise Project, and agreed not to build its own generator at American Falls. On October 1, 1934, the company and the United States signed a contract for these features.

Id.; HRA Report at 73.

Accordingly, despite the fact the power water rights were not subordinated, Reclamation agreed to curtail its diversions for winter power generation at the Minidoka power plant in exchange for receiving power for the Minidoka Project from the Idaho Power Company. In other words, Reclamation was able to store additional water for irrigation purposes and still receive necessary power during the winter generated by Idaho Power. The agreement further ensured Reclamation that the power needs for the Minidoka Project would be satisfied. In addition, the agreement expressly stated that it would not affect Reclamation's water rights:

H. Nothing in the contract contained shall be or constitute a release, surrender or abandonment by the United States or any of its rights to use of water for power purposes at the Minidoka Power plant nor a release, surrender or abandonment by the United States of any rights acquired by construction of the American Falls Reservoir.

I. It is agreed that the water conserved and made available by the terms of this agreement is for storage in the American Falls Reservoir . . .

See Ex. K to *Thompson Aff.*; 1934 Contract at 7.

Later, in order to allow for additional irrigation storage in the winter, including storage at Palisades Reservoir, Reclamation entered into contracts with the project districts and other spaceholders to curtail the winter power operations at the Minidoka power plant, as well as other winter diversions. Although the districts that use reserved power agreed that Reclamation could forego exercising the two senior power rights at Minidoka Dam during the winter months in order to store water for irrigation purposes upstream, the benefiting spaceholders and Reclamation in turn agreed to the following “power loss calculation”:

Winter Power Operation; Minidoka Powerplant

24. (a) . . . it will be the objective of the United States in the operation of both its American Falls and Minidoka powerplants to curtail the release of additional water from American Falls Reservoir for power production at those powerplants during the storage season of any year whenever operation of those powerplants to the full extent of their respective water rights for power production would result in a loss of irrigation water otherwise storable in the reservoir system.

* * *

(c) . . . *To offset such losses, the United States will, as nearly concurrently as practicable, make replacement by the delivery of power and energy into the Minidoka power system at the Minidoka powerplant from other interconnected Federal powerplants being operated under the Federal Reclamation Laws. Payment for such replacement power and energy shall be made by the Company and all other contractors having reservoir rights benefiting from the water savings resulting from operations under the provisions of (a) of this article in the annual amounts determined as follows:*

See Ex. B to *Jarvis Aff.*; Contract at 30-33 (emphasis added).

Accordingly, history shows that Reclamation has never agreed to a blanket subordination of its decreed power water rights at the Minidoka power plant. Instead, Reclamation has entered into agreements with others to compensate the “power loss” resulting from curtailing its rights

during the winter in favor of irrigation storage. These agreements were clearly aimed at keeping the Minidoka Project, and those irrigation districts that rely upon the reserved power, whole.

The Special Master's *Order* approving the "new" proposed remarks agreed to by the State of Idaho and Reclamation completely ignores this consideration and the interests of the Minidoka Project irrigation districts that rely upon reserved power and unlawfully expands the subordination contrary to the Palisades Contracts and terms of the *Eagle Decree*.

II. The Special Master's *Order* Unlawfully Expands the Subordination of the Power Water Rights Contrary to the Terms of the Palisades Contracts and *Eagle Decree*.

Despite the plain language of the winter power operations provision in the Palisades Contracts and the *Eagle Decree*, the Special Master's *Order* completely ignores the facts surrounding the development of reserved power at the Minidoka power plant as well as the legal interests of the various irrigation districts in those power water rights. The *Order* omits critical terms from the Palisades Contracts and *Eagle Decree* and instead approve a new broader subordination remark. First, the Minidoka power rights are now subordinated to additional water rights beyond just "irrigation storage". Second, the remark omits the "power loss" provision agreed to by Reclamation to make up for lost power caused by the curtailment of winter power generation. Since the Special Master approved the agreed upon subordination remark that differs from the contract terms and *Eagle Decree*, it is likely that future administration of these water rights will be inconsistent with the prior decree resulting in a negative impact upon the irrigation districts and their water users.

The irrigation districts served by the Minidoka and Palisades project have contractual and state law interests in the power water rights at Minidoka and Palisades dams. *See Temple Aff.* at 4-5, ¶¶ 12-13; *Bingham Aff.* at 3-4, ¶¶ 5-7; *Sorenson Aff.* at 2-3, ¶¶ 4-5. With respect to the

operation of the senior water rights at the Minidoka power plant, A&B, BID, and FID all have contracts with Reclamation which specifically address the curtailment of winter power operations and the consideration given by Reclamation and other spaceholders for that additional irrigation storage. *See Temple Aff.* at 4-5, ¶¶ 12-13; *Bingham Aff.* at 3-4, ¶¶ 5-7; *Sorenson Aff.* at 2-3, ¶¶ 4-5. The contract language is specific in that it authorizes Reclamation to curtail winter power operations when operating the power plant to the full extent of its water rights “would result in loss of irrigation water otherwise storable in the reservoir system”. *Id.* However, as consideration for this “curtailment”, Reclamation is obligated to offset the resulting “power loss” through replacement power and spaceholders benefiting from the irrigation storage are required to pay for the “replacement power and energy”. *Id.* In its summary judgment briefing the State of Idaho admitted the “proposed decree remarks at issue in this motion are not identical to the language from the Palisades contracts”. *See State Br.* at 11. However, since the *Eagle Decree* affirmed the Palisades Contracts in total, which includes the specific consideration agreed to in exchange for Reclamation’s winter subordination of the power water rights at the Minidoka power plant, there is no question the power loss provisions relate to and are part and parcel of the exercise of the water right.

The remark approved by the Special Master’s *Order* makes absolutely no mention of this provision and the specific consideration given in order to curtail the winter power water rights at the Minidoka power plant. Consequently, the remark ignores the irrigation districts’ interests in the power water rights and the reserved power produced for project purposes.⁷ Although Reclamation argued on summary judgment that it can agree “to limit the exercise of a water right

⁷ The Coalition, as parties to the Palisades Contracts, must consent to any attempt by Reclamation to expand the scope of the subordination agreed upon in those contracts. Since there is no agreement, there is no authority to approve that expansion. As such, the *Order* should be reversed.

such as those agreed to in the Palisades contract”, it consciously omitted the express consideration given in the Palisades Contracts, i.e. the “power loss payment” provision, in the new subordination remark agreed to with the State of Idaho.⁸ *See Reclamation Br.* at 11. Reclamation cannot use the Palisades Contract to claim it has the ability to subordinate its water rights and yet ignore the very consideration given in those contracts that was necessary to obtain the limited subordination in the first place.

Although the State and Reclamation proposed an additional remark stating that the decree does not “alter, amend, or modify the contracts”, the remark is of no consequence if the Watermaster of Water District 01 does not distribute water to Reclamation consistent with the contract provisions and the *Eagle Decree*. If Reclamation is allowed to unilaterally subordinate its winter power right operations to all present and future junior water rights other than “irrigation storage”, then the subordination conflicts with the specific language that Reclamation agreed to in the Palisades Contracts. Taking water away from Reclamation’s power rights for other “non-irrigation storage” purposes could result in an increase in power rates for reserved power. *See Temple Aff.* at 6-7, ¶¶ 15-17; *Bingham Aff.* at 4-5, ¶¶ 10-12; *Sorenson Aff.* at 5, ¶ 10. Consequently, the irrigation districts and water users that rely upon those reserved power rates would be negatively impacted by higher costs imposed by Reclamation. *See Temple Aff.* at 7, ¶ 17; *Bingham Aff.* at 5, ¶ 12; *Sorenson Aff.* at 5, ¶ 10.

Special Master Dolan’s *Order* ignores the specific provisions in the Palisades Contracts by stating that “power generation at the Minidoka power plant may be curtailed to benefit

⁸ Ironically, at oral argument, Reclamation’s attorney advised the Special Master that a reference could be made to the “power loss” provision:

In our brief, we suggested that although there was no need to reference the power loss provisions, if the court wanted to do that, it could do so by simply indicating that the subordination contemplated would continue only so long as the power loss payments were made . . .

Tr. P. 10, Lns. 6-11.

storage of water for irrigation and other purposes, regardless of the power loss payment system relied upon by the districts.” *Id.* Contrary to this statement, disregarding the “power loss” payment provision is not what the parties bargained for when Reclamation pursued its Palisades Contracts with the Coalition and other entities in order to construct Palisades Dam. Just the opposite, the consideration of the “power loss” payment was crucial to obtaining the subordination of the senior Minidoka power rights 1-217 and 1-218 in order to keep those districts that rely upon reserved power whole.

The proposed remark goes beyond merely addressing a relationship between hydropower generation and irrigation storage. According to at least some of the State’s witnesses, even the senior Minidoka power rights, 01-0217 and 01-0218, would be subordinated to all future non-hydropower water rights. See Part V.C, *infra*. The proposed subordination for the two junior power water rights at Minidoka Dam, 01-4024 and 01-4025, to all future water non-hydropower water rights, not just junior irrigation storage water rights, is explicit. Therefore, the remark approved in Special Master Dolan’s *Order* goes beyond the historical limitation on the exercise of the power rights to store water for irrigation purposes. If the blanket subordination approved by the Special Master is upheld, Reclamation’s power water rights stand to lose water that could be diverted for other purposes, including upstream recharge, to the detriment of the irrigation districts that rely upon reserved power to operate and deliver water to their landowners.⁹

Ironically, at oral argument on the summary judgment motions, Reclamation’s attorney made the following statement:

⁹ The Idaho Water Resource Board has a 1980 water right permit (01-7054) for 1,200 cfs to the Snake River. IWRB has apparently diverted water from the Snake River under this water right at different locations, including above Minidoka Dam. In addition, IWRB has outstanding applications for permit for recharge purposes that were filed in 1998. Those applications seek to appropriate more water for recharge purposes from the Snake River, including up to 6,699 cfs from the Snake River and up to 2,191 cfs from the Henry’s Fork watershed. All of these diversions would be located upstream from the Minidoka Dam and powerplant.

Whether the remark includes “irrigation” or not, does not make a bit of difference, because maximizing storage generally is exactly the same thing as maximizing storage for irrigation.

Tr. P. at 6, lns. 12-16. This argument, however, is belied by both the plain language of the subordination remark approved by the *Order* and Reclamation’s objection to the Director’s original subordination remark in the recommendation. If it were true, as Reclamation asserts, that including “irrigation” “does not make a bit of difference,” then it unclear why Reclamation was so determined to keep the word “irrigation” out of the remark that it agreed to and proposed to the Court on summary judgment.

The end result of these changes drastically alters the consideration granted by the spaceholders when they agreed to subordinate power rights only to irrigation storage and vastly expands the subordination of the power rights. In short, removing the word “irrigation” from the proposed remark will allow for additional uses that “go beyond” the *Eagle Decree*. See Ex. C. to *Affidavit of Kent Fletcher* (Tuthill Depo. at 62-63; 121-23). Furthermore, in light of the State’s lack of authority to subordinate Reclamation’s power water rights when they were decreed in the *Foster Decree*, any attempt to expand the voluntary subordination in the Palisades Contract would constitute a takings.¹⁰

In summary, Special Master Dolan’s *Order* approves remarks for Reclamation’s water rights contrary to the terms of the Palisades Contracts and the *Eagle Decree*. The omission of the “power loss” provision and the “irrigation storage” terms ignores the irrigation districts’

¹⁰ Even though the *Eagle Decree* has been in place over forty years, at oral argument Reclamation claimed that using the word “irrigation” would create confusion. Tr. P. at 8, lns. 14-16. This argument was made even though Reclamation and space holders included the word “irrigation” in the Palisades Contracts and Reclamation claims that it always has managed the storage system in accordance with the contracts. There is nothing in the record to support the position that the word “irrigation” creates confusion and why it should be removed, contrary to the terms of the Palisades Contracts and the *Eagle Decree*.

interests in these water rights and unlawfully expands the subordination of the water rights. The Court should reverse Special Master Dolan's decision accordingly.

III. The Order Disregards the Irrigation Districts' and their Landowners' Beneficial Ownership Interests in the Power Water Rights.

It is uncontroverted that the beneficial users of the power rights, the irrigation entities, have not consented to the subordination language and elimination of *Eagle Decree* language as requested by Reclamation. See *Temple Aff.* at 7, ¶ 18; *Bingham Aff.* at 5, ¶ 13; *Sorensen Aff.* at 5, ¶ 10. In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the Idaho Supreme Court addressed the rights of Reclamation and irrigation entities concerning the title to irrigation storage rights. The Court found that Reclamation does not beneficially use water for irrigation, it manages and operate the storage facilities; without the diversion by irrigation entities and beneficial use for irrigation, valid water rights would not exist under Idaho law. *Id.*, 157 P.3d at 604. The Court held as follows:

Based upon the United States Supreme Court cases, the Reclamation Act, the Idaho Constitution, Idaho statutory and case law, it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right. The irrigation entities in this case act on behalf of those who have applied the water to beneficial use and repaid the United States for the costs of the facilities. The irrigation districts hold an interest on behalf of the water users pursuant to state law, consistent with the Reclamation Act and U.S. Supreme Court cases that were properly recognized by the SRBA Court.

157 P.3d at 609.

As a result, the Court held that although the name of the United States appears on the water right, title to the use of the water is held by the consumers of the water pursuant to the contracts entered into between Reclamation and the irrigation entities. *Id.*

In the case at hand, it is uncontroverted that Reclamation does not beneficially use the power generated by the water rights. Rather, as can be seen from the affidavits of the

irrigation district managers, the power is used by the irrigators, and power not used by the irrigators is wheeled into the BPA system (southern Idaho power pool). As a matter of law, therefore, the right to generate power may be held in the name of Reclamation, but the title to the use of the water for the purposes of generating power is held by the consumers of the power pursuant to the contracts entered into between Reclamation and the irrigation entities. *See Temple Aff.* at 4, ¶ 11; *Bingham Aff.* at 2-3, ¶ 4; *Sorensen Aff.* at 2-3, ¶ 4. In addition, the power plants and power water rights would not exist but for the irrigation projects, operated and maintained by the districts.

Moreover, the power water rights were acquired by Reclamation for the very purpose of supplying power to the districts to enable them to distribute water to their landowners. *Id.* Absent the power produced at Minidoka and Palisades dams, A&B, BID, and FID could not deliver water to their respective landowners. The irrigation districts and their water users further rely upon the power rates for the reserved power that are set by contract between the districts and Reclamation. *See Temple Aff.* at 5, ¶ 13; *Bingham Aff.* at 3, ¶ 5; *Sorenson Aff.* at 3, ¶ 5.

Any subordination of the power water rights that is inconsistent with the Palisades Contracts stands to negatively impact those power rates and the interests of the water users that rely upon the production of power through those water rights. *See Temple Aff.* at 6-7, ¶¶ 15-17; *Bingham Aff.* at 4-5, ¶¶ 10-12; *Sorenson Aff.* at 5, ¶ 10. The Special Master's *Order* fails to take these interests into account in approving the new subordination remark, therefore the decision should be reversed.

IV. The Evidence in the Record Demonstrates Several Genuine Issues of Material Fact, Thus Demonstrating that the Remarks Do Not Clarify Any Element of a Right or Administration of a Right by the Director Under I.C. § 42-1411(2)(j), and Cannot Be Decreed on Summary Judgment.

Although Special Master Dolan granted the motions for summary judgment, he failed to find that there were “no genuine issues of material fact” necessary to grant summary judgment pursuant to I.R.C.P. 56. Instead, the Special Master’s *Order* only recites the procedural history and provides a brief overview of the summary judgment pleadings filed by the parties. *See Order* at 1-10. Moreover, the Special Master stated that “opinions may differ on what any given provision may mean, but that does not create questions of fact”. *Order* at 13. To the contrary, under Idaho law, if the record contains conflicting inferences or “reasonable minds might reach different conclusions”, summary judgment must be denied. *Loomis v. City of Hailey*, 119 Idaho 434, 436 (1991). Accordingly, the Special Master’s *Order* should be reversed on the sole basis that it does not satisfy the criteria for summary judgment under I.R.C.P. 56(c).

The remarks approved in the Special Master’s *Order* rewrite and supersede the common plan of administration adjudicated in the *Eagle Decree*. The remarks omit key rights adjudicated by the *Eagle Decree*, and are vague and subject to varying interpretations by the State’s and Reclamation’s own witnesses. Because of the vague wording of the remarks and the deviations and omissions from the *Eagle Decree*, the very State officials who would be administering the water rights under such remarks gave conflicting testimony concerning the prospective administration. The State and Reclamation assert their proposed remarks are different than those recommended by the Director of IDWR that were based on “historic practices,” yet their witnesses testify there will be no change from historic practices. As a result, the record before the Court concerning the remarks is conflicting and subject to dispute. With this conflicting evidence before it, the Special Master had no basis to grant summary judgment. Additionally, it

is evident the proposed remarks do not clarify any element of a right or administration of a right by the director as required by I.C. § 42-1411(2)(j).

The State's position is that the proposed remarks, if adopted by the SRBA Court, will supersede the terms and conditions of the *Eagle Decree*. See Ex. B to *Fletcher Aff.*; Spackman Depo. at 47; Ex. C; Tuthill Depo. at 136-38. Since the remarks do not reference or carry forward the terms and conditions of the *Eagle Decree*, the burden is on the proponents of the remark to establish that the remarks will preserve the property rights and "common plan" of administration adjudicated in the *Eagle Decree*.

The record before the Court on the motions for summary judgment consists of the two affidavits in support of the motions, the affidavits in support of the Coalition's Response in Opposition, the Report and Supplemental Report of the Director, and deposition testimony of Tony Olenichak,¹¹ Gary Spackman,¹² David Tuthill,¹³ Lyle Swank¹⁴ and Richard Rigby.¹⁵ The Court must look to this evidence to determine whether there is any material fact in dispute, or whether reasonable persons could reach differing results based on such evidence. As explained below, the evidence comes nowhere close to supporting summary judgment. Accordingly, the Special Master erred as a matter of law when he granted the State's and Reclamation's motions.

A. The Order Unlawfully Omits Parts of and Alters the "Common Plan" of Administration Approved in the Palisades Contracts and *Eagle Decree*.

The evidence proffered in support of Reclamation's motion for summary judgment consisted of a single document – a Status Report from 1968 that describes the agreements and administrative mechanisms that were necessary to incorporate into the contracts with the water

¹¹ *Fletcher Aff.*, Ex. A

¹² *Fletcher Aff.*, Ex. B

¹³ *Fletcher Aff.*, Ex. C

¹⁴ *Fletcher Aff.*, Ex. D

¹⁵ *Fletcher Aff.*, Ex. E

users in order to secure the water supply for the Palisades Project. *See Jarvis Aff.* Ex. A. As discussed above, the Status Report describes why the adjudication of the common plan of administration in a comprehensive court decree was a critical element in securing these agreements and administrative mechanisms. The Status Report states:

It was recognized in the negotiations that led to the water savings and exchange arrangements necessary for the construction of Palisades Reservoir that these arrangements would require adjustments in the court decrees that govern the distribution of water in the Upper Snake River Valley, Water District 36. All the water users agreed to the arrangements on the basis that this would be accomplished and that all the compromises agreed to in the negotiations would be included in the resulting court decree.

Ex. A to *Jarvis Aff.*, Status Report at 6.

Given that a decree entered by the SRBA Court may, according to the State witnesses, supersede the *Eagle Decree*, the Status Report supports the incorporation of the terms of the *Eagle Decree* into the SRBA decree and argues against the proposal by the State and Reclamation to selectively rewrite and otherwise ignore key provisions of the *Eagle Decree*. Reclamation's witness Richard Rigby testified as to the importance to Reclamation of the *Eagle Decree* as described in the Status Report:

Q. Okay. Then on page 6 of that same document, the status report, it identifies in the fourth paragraph, starting with "It was recognized in the negotiations," and that paragraph discusses, does it not, the requirement that the arrangements or agreements be referenced in the court decrees which ultimately were identified as the Eagle decrees; correct?

A. Correct.

Q. Okay. And was this requirement or this necessity of attaching these exhibits or referencing these provisions in the Eagle decree, was that done at the joint assistance of not only the water users, but also Reclamation?

A. Well, John Simpson -- not John Simpson. John Rosholt has said that the field solicitor was involved in that. I have no basis to disagree with that. ***Certainly these contracts changed the way business was to be done in the reservoir system. And I'm sure Reclamation felt it necessary that there be no questions that this could be accomplished.*** Winter priority -- winter water

savings, space in reservoirs, you know, those types of things, other space holders could have arguably perceived that they were affected by those provisions. And I'm sure that the United States wanted to resolve all possible objections at the time the contracts were executed.

Q. So was it Reclamation's position, to the best of your knowledge, that it was important that the Eagle Decree contain these provisions that were negotiated between the water users and Reclamation so that those provisions would be binding upon the water users and Reclamation could enforce those provisions upon the water users?

A. Well, *I know that Reclamation wanted those provisions addressed in the decree that involved all the water users.* I can't say precisely the motive behind that as to whether, you know, the contracts themselves were administrable and were binding between the parties. *I think the issue was more to make sure that other parties, third parties, did not interfere with the administration.*

Q. Mr. Rigby, would it be fair to say that based upon this correspondence, that Reclamation did have some opportunity at the very minimum to comment on what should or shouldn't be included in the draft complaint for the Eagle decrees in terms of the suggestions they offered?

A. *It certainly appears that Reclamation was involved in the specific portions of the decree.*

Q. And that, would it not be consistent with the paragraph we were referring to in the status report on page 6 describing the negotiations and then the inclusions of those provisions from the negotiations in the ultimate decrees for the Palisades contracts and the additional uses identified and decreed?

A. Yes.

Ex. E to *Fletcher Aff.*; Rigby Depo. at 18-19, 23, 27-8 (emphasis added).

If in fact the SRBA decree will supersede the *Eagle Decree*, and the SRBA decree does not carry forward the binding provisions of the *Eagle Decree*, Reclamation, the State and contracting parties will lose the binding effect sought by Reclamation and the contracting water

users to be achieved by the *Eagle Decree*. This is because the proposed remarks will not adopt the “common plan of administration” adjudicated in the *Eagle Decree*.

The *Eagle Decree* proceedings were initiated to adjudicate supplemental water rights (April 1, 1939 priority) and to confirm the contracts entered into for purposes of allowing the construction of Palisades Reservoir. The Palisades Contracts and the *Eagle Decree* created a “common plan for administration of the Snake River”. Ex. E to *Stanish Aff.* (*Eagle Decree* at 19). The contracts were necessary so that water could be made available to store in the newly constructed Palisades Reservoir. During oral argument on the summary judgment motions, Reclamation’s attorney further recognized that Palisades Reservoir would not have been a reality without a “system that would provide enough water.” Tr. P. at 100-01.

Congress doesn’t build new reservoirs unless they know they have the water to fill them. And that was the issue with Palisades. There wasn’t enough water to fill the reservoir, and they went out and they *negotiated with the irrigation districts and other water right holders to create a system that would provide enough water.*

Id. (emphasis added).¹⁶

The *Eagle Decree* court “ratified, confirmed, and approved” the Palisades Contracts and specifically highlighted provisions regarding operations of the reservoirs. Importantly for these subcases, the *Eagle Decree* Court affirmed the contract provisions governing winter operations at the Minidoka power plant and the release of Jackson Lake and Palisades water for power production. Ex. E to *Stanish Aff.* (*Eagle Decree* at Exs. C & E).

¹⁶ The State and Reclamation seek to undo this “common plan” (or “system” as the Bureau’s attorney references it) by bifurcating the elements of the plan and attacking them individually in separate subcases. The power loss payment program constitutes a vital part of the “common plan” for administration of the *Eagle Decree* water rights and was the consideration received for the subordination of power rights to irrigation storage. The only grounds for any claim of subordination are the power loss payment program and subordination to irrigation storage set forth in the Palisades Contracts.

This “common plan” – or “system” – that allowed for the construction of the Palisades Dam required commitments and actions by the spaceholders to ensure that the Palisades Reservoir could fill. There was a shift in some of the historical irrigation and management practices of the canal company and irrigation districts throughout the Snake River plain to ensure that there would be sufficient water for the Palisades Reservoir. This allowed Reclamation to store more water in the reservoirs and, as such, preserve more water for irrigation during the summer. This shifting in historical practices constituted the “common plan” confirmed by the *Eagle Decree*.

According to Reclamation, the “common plan” consists of the nine “principal points” included in spaceholder contracts and summarized in the Status Report attached to Reclamation’s brief, which create a plan or methodology for operating the reservoirs “as a unit.” *See supra* at 9-10; Ex. A to *Jarvis Aff.*; Status Report at 2; Ex. E to *Fletcher Aff.*; Rigby Depo. at 141-42. Yet Reclamation’s witness acknowledged that Reclamation and the State are not seeking to integrate every contract provision adjudicated in the *Eagle Decree* into the water rights subject to these subcases. Ex. E to *Fletcher Aff.* ; Rigby Depo. at 123-4; 134-5; *See Reclamation Br.* at 4; *State Br.* at 7. At the same time, however, Mr. Rigby could not identify which aspects of the *Eagle Decree* Reclamation will or will not seek to incorporate into other decrees. *Id.* So, despite the fact that the “principal points” adjudicated as a “common plan of operation” of Reclamation’s facilities were intended to assure operation of all such facilities “as a unit,” Reclamation could not explain why the entire “common plan” should not be referenced in each of the water rights for all of Reclamation’s facilities.

The State and Reclamation have made a unilateral and unsupported decision to approach the integration of the “common plan” into the water rights adjudicated in the SRBA on a

piecemeal basis, seeking to include only “one distinct component of that comprehensive plan.”

State Br. at 8-9. They apparently ask the water users and the Court to “trust us” that all the principal points of the common plan that they deem relevant are included in these water rights, and will eventually be included in the future adjudication of the water rights they deem appropriate. This goes to the heart of the adequacy of the remark approved by the Special Master on summary judgment, and represents a fundamental issue in dispute in these subcases. This is not a purely legal issue, as illustrated by the deposition testimony of the State’s and Reclamation’s witnesses. As a result, the Special Master erred in granting summary judgment in favor of the State and Reclamation.

Moreover, even as to the selected contract provisions adjudicated in the *Eagle Decree* that the State and Reclamation deem relevant to these subcases, they have again unilaterally decided how to characterize and summarize those provisions in their proposed remarks. In doing so, they have eliminated matters they deem “superfluous” or “neither appropriate or necessary” and categorically state their proposed remarks are “founded on and consistent with” the contract provisions, and “will not affect any parties’ right.” *Reclamation Br.* at 7; *State Br.* at 11. They offer no evidentiary support for these assertions, which are not purely legal in nature.

With respect to the winter power operation at the Minidoka powerplant, the key provision included as part of the common plan adjudicated in the *Eagle Decree* is Exhibit E, Paragraph 24(a) of the Decree, which reads as follows:

Winter Power Operation: Minidoka Powerplant

24. (a) The United States, in its operation of American Falls and Minidoka dams during the storage season of each year is required to pass through enough water to satisfy existing diversion rights in the stretch of the river down to and including Milner Dam and certain power rights below Milner Dam, and has the privilege under an existing decree to use at Minidoka Dam 2,700 cubic feet per second of water for the development of power.

While the United States must operate the American Falls and Minidoka dams so as not to interfere with these third-party rights, it will be the objective of the United States in the operation of both its American Falls and Minidoka powerplants to curtail the release of additional water from American Falls Reservoir for power production at those powerplants during the storage season of any year whenever operation of those powerplants to the full extent of their respective water rights for power production would result in a loss of irrigation water otherwise storable in the reservoir system. Accordingly, except as it is determined by the Secretary that additional water may be passed through American Falls and Minidoka dams without the loss of water that could be stored for irrigation in the reservoir system, the United States has, during each storage season beginning October 1, 1952, and ending in 1958, and will, commencing with the storage season of 1958-1959 and continuing so long as the provisions of (c) of this article remain operative, limit the release of water through these dams as follows:

To the amount of water required to provide flows below Minidoka Dam sufficient to meet existing diversion rights in the reach of the river through Milner Dam and the power rights required to be recognized under the provisions of the contract of June 15, 1923, between the United States and Idaho Power Company (Symbol and No. Ilr-733), as those diversion and power rights may be modified from time to time.

Ex. E to *Stanish Aff.*; Eagle Decree (Ex. E at 28-29).

This provision from the *Eagle Decree* references in the first four lines, and in the reference to “third party rights” in the eighth line, Reclamation’s obligation to pass water through the reservoir system to satisfy the natural flow diversion rights of the North Side and Twin Falls Canal Companies. Ex. E to *Fletcher Aff.*; Rigby Depo. at 17, 35-6, 145. The reference to “certain power rights below Milner Dam” in the fourth and fifth lines, and the indented paragraph, is to rights held by Idaho Power Company through its 1923 Contract with Reclamation. *Id.*

Reclamation and the State made the unilateral and unjustified decision to eliminate these references to the rights of NSCC, TFCC, and Idaho Power in their proposed remarks. Reclamation’s witness, Mr. Rigby, explained that the rationale for not including reference to these rights in the proposed remarks was Reclamation’s assessment that the TFCC and NSCC

rights are not being exercised and so they don't exist anymore, and that Idaho Power's referenced contract rights were eliminated in the agreements surrounding the 1976 reconstruction of American Falls Dam. Ex. E to *Fletcher Aff.*; Rigby Depo. at 16-7, 64, 80, 145-6.¹⁷ Needless to say, NSCC, TFCC and Idaho Power disputed Reclamation's assertions concerning their rights, and the decision to eliminate the reference to their rights in the proposed remarks. NSCC and TFCC, as beneficial owners of the water rights, have filed claims to storage in the SRBA, which covers the water rights formerly used during the winter months that were exchanged for preferred space for irrigation storage in American Falls and Palisades Reservoirs.¹⁸

Although these claims were initially recommended disallowed, NSCC and TFCC filed objections and the cases are pending before the SRBA Court. Accordingly, there are disputed issues of fact as to these provisions from the Palisades and *Eagle Decree* that the State and Reclamation unilaterally disregarded and chose to abandon in their "agreed to" remarks. Special Master Dolan's *Order* makes no mention of these facts or issues that remain.

In addition to this dispute, the nature and enforceability of Idaho Power's contract rights is the subject of pending litigation between Idaho Power and Reclamation in the Federal Court of Claims. Ex. E to *Fletcher Aff.*; Rigby Depo. at 145-6. In their briefs, Reclamation and the State assert that even if Idaho Power's contract rights are upheld, they relate to storage rights at American Falls Reservoir, do not need to be referenced in the remarks for the power rights in

¹⁷ Demonstrating the conflicting evidence before the Court on these Motions, and in contradiction to the testimony of Mr. Rigby, Anthony Olenichak, Program Manager for Water District 01, testified that Reclamation does operate the system to satisfy the third party rights:

Q. What a particular concern to me is, is existing diversion rights in the stretch of the river down to and including Milner Dam, part of that first sentence [of Paragraph 24(a)] that you read. Do you as you sit here today, know how or if the Bureau of Reclamation has operated the storage system to satisfy that portion of 24(a)?

A. Yes, they do.

Q. So they recognize that as an obligation they have?

A. Yes.

Ex. A to *Fletcher Aff.*; Olenichak Depo. at 41-2.

¹⁸ See water right claim nos. 1-10042A (TFCC); and 1-10042B, 1-10043A (NSCC).

these subcases, and can be exercised independently from the power rights in these subcases.

State Br. at 9, fn. 2; *Reclamation Br.* at 9. This position ignores the fact that Idaho Power's 1923 Contract rights are expressly integrated into paragraph 24(a) for power operations at Minidoka and adjudicated as part of the common plan in the *Eagle Decree*. Moreover, when asked specifically about this point, Reclamation's witness stated that he didn't know whether Idaho Power's rights should be referenced in the remark if they are held to be valid in the pending Federal Court of Claims litigation.

Q. Okay. Now, if the federal court determines that Idaho Power is right as opposed to Reclamation is right, would your opinion change that whether or not that reference or a reference to that '23 contract may be necessary in these particular water rights?

A. Well, I think -- *I guess I don't know*, because in all cases what this remark is attempting to do is describe the water rights at Minidoka. Now, if there's an obligation upstream to deliver water past Minidoka, that's -- that can exist independent of the power right at Minidoka. Frankly, if there are natural-flow diversionary rights below Minidoka that are prior in time to the Minidoka right, they can exist independent of that and still be honored. So I -- so *I guess the answer is I don't know*.

Ex. E to *Fletcher Aff.*; Rigby Depo. at 146-7 (emphasis added).

At a minimum, this illustrates a fundamental dispute as to the factual basis for the proposed remarks. The Idaho Power rights under its 1923 Contract are specifically referenced in Exhibit E, paragraph 24(a) of the *Eagle Decree* as an operational constraint on the storage of water in and delivery of water through the federal system that directly relates to and affects the exercise of the power rights at Minidoka. They are not storage rights as represented in the Reclamation and State brief. Put another way, the balance between storage and power generation is the fundamental tension in the operation of the federal system. In order to operate the system under a "common plan for administration," that balance needs to be reflected in the water rights for all the facilities. As stated by Reclamation's witness:

Well, the implication to that is that in a year when the obligations, shall we call them, the companies' asserted rights at Twin Falls are not being met under the '23 contract, is by definition a year when Reclamation is concerned that the reservoirs may not fill. So what that, in a sense, is doing is saying "Okay, Reclamation, you set the level of flows that you believe were necessary to provide a reasonable, safe -- reasonable security that the reservoir is going to fill, and then add to that additional releases to the power company," in other words, make -- you know, reduce the likelihood of fill. So that is the whole story.

Ex. E to *Fletcher Aff.*; Rigby Depo. at 148-9.

The only prejudice to Idaho Power's rights is if they are not integrated into the remark for the water rights in these subcases. If the Federal Court of Claims rules that Idaho Power's 1923 contract rights are no longer enforceable, that ruling will control. It is therefore essential that Idaho Power's rights be referenced. This can be simply accomplished through a general incorporation of the contract provisions adjudicated in the *Eagle Decree*. See Part XI, *infra*.

B. The Operations Sought Under the New Remark Violate the Purposes for which the Palisades and Minidoka Projects were Authorized, the Claims Filed in the SRBA by Reclamation for storage, and the Palisades Contracts.

One of the notable differences between the language of Exhibit E, paragraph 24(a) of the *Eagle Decree* quoted above, and the remark language approved in the Special Master's *Order*, is the purpose for which the Minidoka and Palisades hydropower rights would be subordinated to water stored in the system. Exhibit E, Paragraph 24(a) of the *Eagle Decree* refers to a determination by the Secretary relative to the balance of generating power as against the "loss of irrigation water otherwise storable in the reservoir system." In contrast, the remark language proposed by Reclamation and the State refers to the "loss of water otherwise storable in the reservoir system" (omitting the word "irrigation"). The former Director of IDWR, David Tuthill, testified that the elimination of the word "irrigation" from the proposed remark was to allow for

additional uses, and “go beyond” the *Eagle Decree*. Ex. C to *Fletcher Aff.*; Tuthill Depo. at 62-3; 121-3.

The State asserts that the proposed remarks are “consistent with the statutory provisions authorizing the Palisades Project and the Palisades contracts resulting therefrom.” *State Br.* at 10. Those statutory authorizations and water user contracts adjudicated in the *Eagle Decree* are limited to irrigation and power purposes. As set forth in Reclamation’s Brief, the Palisades project was authorized for supplemental irrigation supply, flood control and hydroelectric power generation purposes. *Reclamation Br.* at 3. The Minidoka Project and its various facilities were authorized by the Secretary of the Interior under the 1902 Reclamation Act, and subsequent Acts of Congress, for irrigation and power purposes. Reclamation’s claims in the SRBA reflect these same purposes. Ex. E to *Fletcher Aff.*; Rigby Depo. at 42-3; 143-44.

However, deposition testimony of both the State and Reclamation witnesses reveals the intent to store water without regard to any limitation reflected in the authorized purpose for the Palisades or Minidoka Projects, or the water rights claimed therefore. Despite the legal limitations on the purpose for storage in federal law, the claims filed in the SRBA, and in federal spaceholder contracts, Reclamation’s intent, and the apparent purpose for omitting the word “irrigation” in the remark proposed by the State and Reclamation, is to store water for any purpose whatsoever.

Reclamation’s witness testified that under the proposed remark Reclamation intends to simply fill the reservoir system, regardless of purpose.

Q. Okay. When you're talking about subordination of the 2700 cfs historically, was it to storage in the reservoir system in general or storage or reservation storage of water for a specific purposes?

A. We've considered it to be storage, period.

Q. Okay.

A. We have not tried to separate out the purposes, if you will.

Q. Okay. That's what I was looking for.

A. Yeah.

Ex. E to *Fletcher Aff.*; Rigby Depo. at 128-9.

As a result, with respect to its decision as to generating power versus storing water, Reclamation intends to assure a physical fill of the system, as opposed to a fill purely necessary to satisfy its contract obligations including irrigation. This operation is contrary to authorized purposes, its SRBA claims and its contractual obligations adjudicated in the *Eagle Decree*. The danger of such intent is not only that unauthorized storage could injure the water rights of third parties, but also that such vague and undisciplined administration will lead to arbitrary decisions in the future by the State or Reclamation as to the management of the system to the detriment of the spaceholders and other parties with contract rights, including the parties that benefit from power operations. Protection for such contracts should be reflected in the water rights decreed to the facilities, and the administration of the system should be according to such rights.

Reclamation's storage of water is ostensibly subject to administration by the State, and Reclamation's practice in Idaho is to defer to State administration. Ex. E to *Fletcher Aff.*; Rigby Depo at 51. Therefore, it is relevant to consider whether the State would limit the storage of water in federal reservoirs to the purposes set forth in federal law, Reclamation's water right claims, and the Palisades Contracts. It is clear the State's intent under the proposed remark language is to not so limit the storage as against the exercise of the power rights in any way. Rather, it is the State's intent to allow Reclamation to simply store water, regardless of purpose or need. The State exhibits no motivation to not limit storage to other than a "fill and spill" operation – that is, "you fill the reservoir until its full, and then you spill whatever comes into it

after that point.” Ex. A to *Fletcher Aff.*; Olenichak Depo. at 99-100. The State simply accounts for the stored water later, as “after-the-fact accounting.” *Id.*; Olenichak Depo. at 78, 116. Mr. Anthony Olenichak, Program Manager responsible for the day-to-day operations of water delivery in Water District 01 for the Department of Water Resources, testified that in the State’s view, “irrigation storage” as used in the *Eagle Decree* equates to any purpose whatsoever. Ex. A to *Fletcher Aff.*; Olenichak Depo. at 17. Moreover, he testified that the State defers to Reclamation’s operations.

Q. What entity is responsible for storage operations in the Upper Snake?

A. The Bureau of Reclamation is responsible for the operations of the reservoirs, especially during the nonirrigation season, and they have to deliver water according to the water rights as determined by the watermaster during irrigation season or when water rights are in priority.

Q. Okay. Based upon your understanding, how is water stored in the Upper Snake in the winter operations by the Bureau?

A. Bureau of Reclamation tries to keep their storage up as high in the system of the multi-reservoir system as possible. That ensures the optimization of accumulating the most amount of water in the storage system for the irrigation season.

Q. Is that water stored in the Upper Snake reservoirs during the non irrigation season by priority?

A. Not necessarily.

Q. So the Bureau can act independent of the Water District’s opinions?

A. Yes.

Ex. A to *Fletcher Aff.*; Olenichak Depo. at 17- 22.

So, the State and Reclamation operate a “shell game,” in which each defers to the other as the authority, and neither accounts for the storage of water in the system for irrigation as against

the exercise of water rights for the generation of power, despite the fact that such operations are expressly directed in Reclamation's contracts, which in turn are adjudicated as a key component of the "common plan of administration" adjudicated in the *Eagle Decree*.

C. The Basis for the Remarks, and Their Meaning and Effect on Future Administration, is Vague and Subject to Varying Interpretations by the State's own Witnesses.

On December 19, 2006, the Director filed his Report that recommended a remark be included in the decrees for the Minidoka and Palisades power rights requiring that the "appropriator shall not make a delivery call for hydropower generation except as against junior hydropower rights." In the *Supplemental Report*, the Director attempted to provide support for that recommendation, including an affidavit by Anthony Olenichak, asserting that the recommended limitation was consistent with "historic practices" in Water District 01, primarily because Reclamation has not exercised a call for administration of water under its power rights. The Recommendations and *Supplemental Report* are still of record in this case, have not been amended, and thus continue to constitute "prima facie evidence of the nature and extent of the water rights acquired under state law." I.C. § 42-1411(4). Indeed, this Report recommends the language now opposed by the State and Reclamation, both of which are supported by affidavits by Mr. Olenichak.

However, Special Master Dolan ignored the existing recommendation in this case and stated that "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." *Order* at 11. The Special Master further stated that the "parties have had ample notice and opportunity to pursue their objections". *Id.* To the contrary, IDWR never published an amended

director's report, hence no objections were ever filed pursuant to the docket sheet procedure required by AO1.

Moreover, the fact that the State now opposes the Director's original recommendation in and of itself creates a disputed issue of fact. However, to make matters worse, witnesses for the State offer differing testimony as to the basis for both the original recommended remarks and those approved by Special Master Dolan's *Order*, as well as their interpretation and potential administration. This raises additional issues of fact and brings into question the credibility of the State's witnesses, further precluding summary judgment.

Both the current and former Director of IDWR testified that reflecting "historic practices" in water rights decrees is a policy of the Department. Ex. B to *Fletcher Aff.*; Spackman Depo. at 85-6; Ex. C to *Fletcher Aff.*; Tuthill Depo. at 45. On its face, the *Supplemental Director's Report* is based on the Department's interpretation of "historic practices." However, it turns out the report was not based on historic practices in the Upper Snake River at all. Rather, as testified by Mr. Tuthill, the then-Director and author of the Supplemental Report, it was a policy determination based on historic practice in the Boise River, and expressly reflected a "lack of understanding" of actual historic practice in the Upper Snake above Milner Dam. Ex. C to *Fletcher Aff.*; Tuthill Depo. at 38-9; 91-2; 100-101. To make matters worse, according to Mr. Tuthill, the affidavit of Anthony Olenichak in support of the *Supplemental Director's Report* was "not fully correct." *Id.* at 109.

The new remark approved by Special Master Dolan on summary judgment, apparently does not have any better grounding in "historic practices." Both the current and former Director of IDWR testified that the proposed remark language was simply negotiated, the latter stating his understanding of historic practices was based on "secondhand" information. Ex. B to *Fletcher*

Aff.; Spackman Depo. at 97-8; Ex. C to *Fletcher Aff.*; Tuthill Depo. at 109-110. As is evident from the paucity of evidence offered in support of the State's and Reclamation's proposed remark (consisting of a single document from 1968 and an affidavit simply stating that the proposed remark is "consistent" with historic administration), the movants apparently have nothing further to offer. Accordingly, the Special Master had no basis to grant summary judgment approving the agreed upon remarks since there is no factual support to uphold his decision.

Exacerbating the confusion between the Director's recommendation and the newly proposed remarks by the State and Reclamation, the State's witnesses offer varied interpretations of the effect and administration of water under each version. Both the current and former Directors characterize the remark in the Director's recommendation as a subordination of the Minidoka and Palisades hydropower rights as against all other junior rights, except for junior hydropower rights. Ex. B to *Fletcher Aff.*; Tuthill Depo. at 44 Ex. C to *Fletcher Aff.*; Tuthill Depo. at 39.

In contrast, both the current and former Director view the proposed new remark as something less than such a subordination, but differ in their interpretations. Interim Director Spackman stated there is an "element of subordination" in the proposed remark, even though the word "subordination" is not used. However, he could not identify how, or whether, the exercise of the Minidoka power rights would vary as between the two remarks, although there could be "a possibility of departure." Ex. B to *Fletcher Aff.*; Spackman Depo. at 60-63. Former Director Tuthill testified that the proposed remark "allows the power plant to run at 2700 cfs before the storage is completely full upstream," and "would not be complete subordination." Ex. C to *Fletcher Aff.*; Tuthill Depo. at 62, 108.

However, Lyle Swank, the Water District 01 Watermaster, testified that the proposed remark would be no different in its effect on administration than the remark recommended in the Director's Report. He stated that the proposed remark would be a subordination "to all other upstream rights other than power generation." Ex. D to *Fletcher Aff.*; Swank Depo. at 58.

Further, Mr. Swank testified that the *Eagle Decree* subordinates the Minidoka power rights only to storage for irrigation, and not to any other use. *Id.* at 49. However, the current computer accounting program used for administration in Water District 01 treats the rights as subordinate to all uses, including even recharge. *Id.* at 50-53. See Ex. A to *Fletcher Aff.*; Olenichak Depo. at 44-5, 97. The State administrators for Water District 01 apparently view "irrigation storage" as consisting of any use whatsoever.

Q. Okay. I was a little confused as your testimony proceeded as to the extent of the subordination for these two water rights. Are these two water rights subordinated to all upstream uses under the provisions that are articulated or indicated in your affidavit, Exhibit 1?

A. In paragraph 4 of Exhibit 1, the remark subordinates only to irrigation storage.

Q. All right. So would that, in your mind, be a more limited subordination than subordinated to all upstream water rights?

A. No.

Q. Now, you've indicated that – and this is where I get a little confused because you've indicated that language that is now in Exhibit 1 under 217 and 218 is consistent with the historical administration of those water rights; is that correct?

A. That's correct.

Q. But I thought you testified also earlier that the historical administration of those – in the historical administration of those water rights, those water rights had been considered to be subordinate to all upstream uses?

A. That's correct.

Q. So, I mean, do you believe that to be consistent? Previously, as I understand it, Water District 1 had administered those water rights as run-

of-river subordinate to all upstream uses, and I think you indicated that would include junior water rights including recharge and whatever water rights might be upstream, and now the new language that's being proposed subordinated those in a more limited fashion only to irrigation storage; is that correct?

A. That's correct.

Q. How is there a consistency there? That seems inconsistent to me.

A. The consistency is that we subordinated to irrigation storage. In the water right accounting program we've used over the past 19 years that I've been here, it doesn't separate out the storage irrigation from all other uses, whether they be stock water, recharge, whatever. That determination, that issue, has never been brought up until now.

See Ex. A to Fletcher Aff.; Olenichak Depo. at 109-111, at 134-5.

Mr. Swank further testified that this accounting would not change under the newly proposed remarks offered by the State and Reclamation in their motions. *Id.* at 60. So, apparently the State and Reclamation, by their proposed remark, may or may not seek to change historic administration, or administration as described in the Director's recommendation that they oppose.

From the evidence before the Special Master on summary judgment, it was not apparent what administration was contemplated under the new remarks proposed by Reclamation and the State, except that 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.

Based upon the above discrepancies and testimony, the proposed remarks therefore only create confusion, not clarity, and do not meet the standard required by I.C. § 42-1411(2)(j). At a minimum, this shows there were genuine issues of material fact as to the new remarks proposed by the State and Reclamation and that Special Master erred in granting summary judgment approving those remarks as a matter of law.

V. The Procedure Used by the State and Reclamation to Present the Proposed Remarks to the Court Violates Idaho Law.

As required by I.C. § 42-1411, the Director of IDWR submitted a Director's report to the Court. That report, which constitutes *prima facie* evidence of the nature and extent of the water rights, recommended that the subject power rights be completely subordinated. I.C. § 42-1411(4). The State and Reclamation then filed summary judgment motions that can only be interpreted as stating that as a matter of fact and law, the Director's Recommendation was improper. The motions imply that, even though the Recommendation is improper, there is no question of fact, and the language resulting from the negotiations of the State and Reclamation is, as a matter of law, the lawful language that should be inserted into the water rights. In order to support this proposition, the State designated the former Director of IDWR, David Tuthill, who was serving as Director at the time the Recommendation was prepared, and the current Interim Director, Gary Spackman, as the State's designated witnesses for the purpose of the taking of depositions. *See* Ex. F to *Fletcher Aff.*; Email from David I. Stanish.

This action by the State is an "end run" around the constraints of I.C. § 42-1401B. That statute limits the role of the Director to that of an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported. The Director is required to make recommendations concerning water rights, but may not be a claimant on behalf of the State or any subdivision of the State, I.C. § 42-1401B(2), and may not be a party to

the adjudication, I.C. § 42-1401B(3). Although State agencies are authorized to appear and the attorney general may “represent the position of the State”, IDWR is explicitly prohibited from appearing as a party. *See* I.C. § 42-1401C.

The State’s witnesses were unable to distinguish any difference between the position of the State and the position of IDWR. When asked why he was designated as a witness for the State of Idaho, David Tuthill, former Director, answered that he was the State’s witness because of his former role as Director and he was the signatory to the amended Director’s report:

Q. Okay. Let me ask this question very generally: Why you? Do you have a contract with them? Or why are you here, David, in response to a request that somebody talk for the State of Idaho?

A. Well, this issue of the subordination conditions for hydropower is an issue that I addressed in my role -- my previous roles with the agency. I was the primary -- I was the signatory of an amended director's report. And so I oversaw the creation of that amended director's report. I was involved in the preliminary discussions about the predecessor condition, which was applied to the hydropower right on diversion dam on the Boise River. I was directly involved with that. So I have, in my view, as much involvement with these conditions as most people on behalf of the agency.

See Ex. C to *Fletcher Aff.*; Tuthill Depo. at 10-11.

The State’s other designated witness, current Interim Director Spackman, could not identify any difference between the position of IDWR and the State: *See* Ex. B to *Fletcher Aff.*; Spackman Depo. at 94-95. The State and IDWR should not be allowed to circumvent the requirements of I.C. § 42-1401C by filing a summary judgment motion that, relying on IDWR witnesses, contradicts the Director’s recommendation that were properly before the court. This makes a mockery of the provisions of I.C. § 42-1401B.

By granting the State’s and Reclamation’s motions, Special Master Dolan’s order plainly circumvented the procedural requirements of I.C. § 42-1401B, which requires the Director to

accurately report the water rights to the court, as stated above. I.C. § 42-1411 sets forth specific requirement of the Director when filing his report with the Court, which then establishes the right of interested parties to object or respond to the Report as the case may be. The current and past Directors, by now supporting the State's position, must be deemed to be admitting that the Director's report is in error, but never made any attempt to file an amended report to "accurately report" the water rights. As a result, the right to object and respond, as allowed by I.C. § 42-1411, to the new position of IDWR, acting through the State, was improperly eliminated.

Again, if the Court were to allow this type of procedural maneuvering, it would make a mockery of the statutory procedures and specific duties set forth in I.C. §§ 42-1401B, 42-1401C and 42-1411. Accordingly, the Special Master erred in granting summary judgment where the existing Director's Report differed from the remarks proposed by the State and Reclamation which were not subject to an amended Director's Report for purposes of "accurately" reporting the water right claims to the Court.

**VI. The State of Idaho and Reclamation are Bound by the *Eagle Decree*;
Therefore the Proposed Remarks Must be Rejected as a Matter of Law.**

In addition to the above issues with the remarks, it is obvious that Special Master Dolan erred in granting summary judgment because the new remarks are inconsistent with the *Eagle Decree*. Although the parties to the *Eagle Decree* initiated the 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.

Additionally, even if the Court finds that the *Eagle Decree* has no greater effect than a typical summary supplemental adjudication, it is still binding on parties, their successors in interest, and their privies, and further, is an adjudication of all the water in the Snake River upstream from Milner. Under this analysis, both the United States and the State of Idaho are precluded from seeking remarks that would undermine the *Eagle Decree* to which they were party or privy. Accordingly, Special Master Dolan's *Order* is in error on this point and should be reversed.

A. The *Eagle Decree* Proceedings Resulted in a General Adjudication Decree.

1. *Nevada v. United States* precludes any “partially undoing” of the *Eagle Decree*.

The United States Supreme Court case, *Nevada v. United States*, 463 U.S. 110 (1983), establishes that the *Eagle Decree* is, in essence, a general adjudication decree. The background of the *Nevada* case is nearly identical to that leading up to the *Eagle Decree*. The *Nevada* case began with the passage of the Reclamation Act in 1902 and the Government's Newlands Reclamation Project which set aside approximately 200,000 acres and was designed to irrigate the vicinity near Fallon, Nevada, with waters from the Truckee and Carson Rivers. *Nevada*, 463 U.S. at 115. In *Nevada*, the United States was a party in a suit to adjudicate water rights that began in 1913 known as the *Orr Ditch* litigation. In *Orr Ditch*, all water users on the Truckee River were named as defendants. In addition to confirming water rights for a reclamation project, the U.S. also asserted a claim on behalf of the Pyramid Lake Reservation (PLR). *Id.* at 116. Ultimately, pursuant to a settlement agreement, a decree issued in 1944. *Id.* at 118.

In 1973, the Government instituted a subsequent action seeking additional water rights for the PLR. *Id.* The Pyramid Lake Paiute Tribe (Tribe) intervened in support of the U.S. The

defendants in the second adjudication (*Nevada*) included parties to the *Orr Ditch* adjudication and their successors, as well as water rights holders who acquired their rights subsequent to the issuance of the *Orr Ditch* Decree. The District Court in *Nevada* found that the *Orr Ditch* adjudication was intended by all involved to be a “general all inclusive water adjudication suit which sought to adjudicate all rights and claims in and to the waters of the Truckee” and that the United States was precluded by *res judicata* from litigating its claim. *Id.* at 119-120. The Ninth Circuit Court of Appeals reversed in part, holding that litigants are not bound by a prior judgment unless they were adversaries in the prior proceeding. *Id.* at 120.

In its argument to the Supreme Court, the Government argued that it was simply reallocating water that was confirmed to a single party – the United States.

The Supreme Court rejected the arguments of the Government and of the Tribe and held:

We conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree...were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government’s “ownership” of the water rights was at most nominal; the beneficial interest in the rights confirmed to the government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of the Project water to the land...The law of the relevant State and the contracts entered into by the landowners and the United States makes this point very clear.

Id. at 126. In deciding who was bound by the *Orr Ditch* Decree, the Supreme Court adopted the statement of the Court of Appeals that:

A strict adversity requirement does not necessarily fit the realities of water adjudications. All parties’ water rights are interdependent.¹⁹ Stability in water rights therefore requires that all parties be bound in all combinations. Further, in many water adjudications there is no actual controversy between the parties; the proceedings may serve primarily and administrative purpose...

and further declared:

¹⁹ Citing *Frost v. Alturas*, 11 Idaho 294 (1905).

It has been held that the successors in interest of parties who are not adversaries in a stream adjudication nevertheless are bound by a decree establishing priority of rights in the stream...

[In] the settlement of cases of this character every user of water on the stream and all of its tributaries in litigation are interested in the final award to *each claimant*...*Every claimant of the water* of either stream, it matters not whether it be at the upper or lower end of either, or after the junction of the two, *is interested in a final adjudication of all* the claimants of all the waters that flow to the claimants at the lower end of the stream after its junction. In other words,...it matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute.

Id. at 139-140 citing *Morgan v. Udy*, 58 Idaho 670 (1938) (internal citations omitted) (*emphasis in original opinion*). The Supreme Court then held that the United States was bound by the *Orr Ditch Decree* and that the Tribe was also bound by the *Orr Ditch Decree*, even though the Tribe “were neither parties nor co-parties” to the *Orr Ditch Adjudication*. The reason for this is that the Tribe’s interests were represented by the Government. *Id.* The Supreme Court further held that water rights holders who acquired their rights subsequent to the *Orr Ditch* decree could use the decree as *res judicata* against the Government and against the Tribe (who was not a party to the *Orr Ditch* action). In so holding, the Supreme Court stated:

Orr Ditch was an equitable action to quiet title, an *in personam* action. But as the Court of Appeals determined, it “was no garden variety quiet title action.” As we have already explained, everyone involved in *Orr Ditch* contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to. Thus, even though quiet title actions are *in personam* actions, water adjudications are much more in the nature of *in rem* proceedings. Nonparties such as the subsequent appropriators in these cases have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties of that case. We agree with the Court of Appeals that under “these circumstances it would be manifestly unjust...not to permit subsequent appropriators” to hold the Reservation to the claims it made in *Orr*

Ditch; “[any] other conclusion would make it impossible ever finally to quantify a reserved water right.”

Id. at 143-144.

Similarly, the *Eagle Decree* proceedings were no “garden variety” summary supplemental adjudication. Just like the *Nevada* case, everyone involved in the *Eagle Decree* proceedings contemplated a comprehensive adjudication of water rights that was intended to settle once and for all the question of how much of the Snake River each of the litigants was entitled to. *See* Exhibit E to *Thompson Aff.* More than that, the *Eagle Decree* proceedings satisfied the due process requirements necessary to take the binding nature of an *in rem* proceeding. *See* Part VII.A.2, *infra*.

In addition, there is no question that Reclamation was a named party to the *Foster Decree*, in which the senior power rights at Minidoka Dam (1-217 and 1-218) were decreed without any subordination. Reclamation cannot circumvent that decree, and the limited subordination that was negotiated and approved by the spaceholders through the Palisades Contract and ratified and affirmed in the *Eagle Decree* (which was contingent upon the “power loss” payment program).

Special Master Dolan’s *Order* completely glosses over these facts regarding the prior decrees and wrongly concludes that the Reclamation was not bound by the *Eagle Decree* because it was not a McCarran Amendment adjudication. *Order* at 13.

2. Under Idaho law the *Eagle Decree* proceedings resulted in a general adjudication decree.

Under Idaho law, the parties to the *Eagle Decree* had the constitutional right, independent of any statute, to seek an adjudication of the priority of their water rights as against all the world,

the District Court had the jurisdictional power to entertain such an action, and the resulting decree was a general decree.

Idaho's Constitution establishes the private right to appropriate and divert water, and that such right shall never be denied. *See* IDAHO CONSTITUTION, Art. XV, § 3. In order to protect such rights, one may invoke the jurisdiction of the district court, which has original jurisdiction in all cases at law and equity. IDAHO CONSTITUTION Art. V, §§ 1, 20; *Mays v. District Court*, 34 Idaho 200, 205 (1921); *In re SRBA Case No. 39576*, 128 Idaho 246, 258 (1995) (A general water adjudication is a suit within the original jurisdiction of the district court; such power is conferred by Article V, Section 20 of the Idaho Constitution). As the Court in *Mays* clearly articulated:

One has a right to invoke the jurisdiction of the courts to protect his right to the use of water for irrigation purposes, and to secure an adjudication of the priority of his right as against the rights of others. Such an action would exist independent of statute.

Mays, 34 Idaho at 205. Thus, the right to seek an adjudication of the priority, extent and nature of water rights is grounded in the State Constitution, and exists with or without statutory codification.

In *Mays*, the specific issue raised by the petitioner was whether the summary supplemental adjudication statute (former C.S., sec. 7036, now I.C. § 42-1424) was the exclusive remedy for the adjudication of water rights. *Mays*, 34 Idaho at 205. In that case, the Blaine County Investment Company sought an adjudication of water rights through an action to quiet title. The petitioners, who were defendants in the quiet title action, sought a writ of prohibition against the district court, and asserted that a quiet title action did not exist for the adjudication of water rights because the summary supplemental adjudication statute was intended to be exclusive. *Id.*

The Court rejected this argument and held that the summary supplemental adjudication statute was merely a cumulative remedy for the protection of the constitutional right to have water rights adjudicated. *Id.* at 207. From *Mays*, and *Nevada*, it is clear that the method used to adjudicate water rights is less important than the right to do so, and that more than one method of adjudication exists.

The Supreme Court went on to discuss when and under what circumstances a water rights decree *may* be binding on all, including those who were not party to the original decree. *Id.* at 208. The Court stated:

The decrees which petitioner relies on as a bar were ordinary decrees, obtained in the ordinary priority suit. In *Farmers' Union Ditch Co. v. Rio Grande Canal Co.*, and in *Broad Run Inv. Co. v. Deuel etc. Co.*, 47 Colo. 573, 108 P. 755, water decrees had been obtained in a statutory proceeding, which provided for an adjudication of the rights of all existing claimants, upon service of process as directed by statute. In the first-named case it was held that, on collateral attack, by a party who claimed a right to use the water, and did not appear in the original proceedings, it was presumed that proper notice had been given. If we had such a statutory proceeding, if the method of service provided by it constituted due process, and if the decrees relied on by petitioners were obtained in such a proceeding, the question would be far different.

Mays, 34 Idaho at 208 (emphasis added).

The Court cited two Colorado cases which discussed adjudications of water rights that were similar to a quiet title action in that they could not be collaterally attacked, even by those not a party to the original adjudication and stated in substance that if Idaho had such a process, then a decree could bind parties and nonparties alike.

The principle behind the holdings in the Colorado cases was the same as that in the *Nevada* case, that adjudications of water rights must provide finality or such proceedings “could be opened up from time to time, with the result that the rights of the parties to the use of water, although adjudicated, would always be subject to attack.” *The Farmers' Union Ditch Company*

et al. v. The Rio Grande Canal Company, et al., 37 Colo. 512, 515-516 (1906). This rule is a common thread of water law throughout the states that incorporate the prior appropriation doctrine. The United States Supreme Court has stated that “the policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water,” and that, “when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change.” *Nevada*, 463 U.S. at 129 (footnote 10); citing *Arizona v. California*, 460 U.S. 605 (1983); *Minnesota Co. v. National Co.*, 3 Wall. 332 (1866).

In addition to holding that parties to the decree were bound thereby, *The Farmers’ Union Ditch Company, et al.* also held that parties who did not appear in the original adjudication were also bound thereby. *Id.* at 518-519. From the *Mays* analysis, it appears clear that this Court must look at the factual background and the process that led to the *Eagle Decree*, and determine whether the process resulted in a general decree.

As discussed above, although the parties to the *Eagle Decree* initiated the adjudication through the summary supplemental adjudication statute, the *Eagle Decree* was intended to be a complete adjudication of the waters of the Snake River Basin above Milner Dam, and the process that led to the *Eagle Decree* was exactly that which was contemplated in *Nevada* and *Mays* and that which was discussed in *Farmers’ Union Ditch Company, et. al.* Therefore, the *Eagle Decree* was a general adjudication and binding on parties and nonparties alike.

The United States Supreme Court made the special nature of these cases exceedingly clear by noting that a water adjudication, when it is intended to quiet title to all the waters of a system, is *in rem*, and binding on all the world:

Thus, even though quiet title actions are in personam action, water adjudications are much more in the nature of in rem proceedings, Nonparties

such as the subsequent appropriators in these cases have relied just as much on the Orr Ditch decree in participating in the development of western Nevada as have the parties of that case.

Nevada, 463 U.S. 143-144.

Indeed, there is no question in this case that the State of Idaho and Reclamation had notice of the *Eagle Decree* proceedings as the Attorney General's Office represented the Watermaster and Reclamation consulted with the water users on the litigation. *See* Exs. F – I, M to *Thompson Aff.*

a. The Notice in the *Eagle Decree* Proceedings Constituted Due Process.

In *Mays*, the Supreme Court noted that a private decree might be binding on nonparties if, among other factors, the method of providing notice constituted due process. *Mays*, 34 Idaho at 208. Since the time of the *Mays* opinion, the Supreme Court has held that, for the purposes of a water rights adjudication, notice by publication satisfies due process. *See LU Ranching Co., v. United States*, 138 Idaho 606 (2003). This was also the same type of notice that bound nonparties in *Farmers' Union Ditch Company, et. al.*. *See* 37 Colo. at 512 (1906).

Prior to the issuance of the Eagle Decree, notice of the pendency and purpose of the action was published for 3 weeks in newspapers of general circulation in the Idaho counties of Power, Cassia, Minidoka, Twin Falls, Jerome, Blaine, Gooding, Lincoln and Elmore, and all provisions of the statute relating to notice and publication of notice were complied with. *See* Ex. A to *Second Affidavit of Travis L. Thompson* (filed June 25, 2009, Subcase Nos. 1-4 et al.); *see also*, Ex. E to *Thompson Aff.*; Findings of Fact at 2.

A companion case with the same parties to the Twin Falls County District Court case was filed in Fremont County to cover Snake River water users above Blackfoot. *See Aberdeen-Springfield Canal Company et al. v. Henry Eagle* (Seventh Jud. Dist., Fremont County District

Court, Case no. 6117). Notice of the pendency of that action was published in various counties in eastern Idaho as well to comply with the requirements of I.C. § 42-1405.

The notices filed for purposes of the Twin Falls County case advised all affected persons in those counties of the proposed water rights to be decreed and “[t]hat this cause will be brought on for hearing in open court at 2:00 o’clock P.M., on the 20th day of March, 1967, at which time any party interested may appear and defend against said rights as above set out.” See Ex. A to *Second Thompson Aff.* (emphasis added).

Furthermore, as recited by the *Eagle Decree* Stipulation, the legal action joined as a party every person claiming a right to divert water from the Snake River. See Exhibit A to *Second Thompson Aff.* As a result, the method for providing notice in the *Eagle Decree* proceedings fully satisfied due process, both by joining all interested persons in the action, and by publishing notice of the action in all counties where potentially affected persons might reside. Compare *LU Ranching Co., v. United States (In re SRBA Case No. 6)*, 138 Idaho 606 (2003); *Farmers’ Union Ditch Company, et. al.* 37 Colorado 512 (1906).

b. The Eagle Decree Proceedings Adjudicated the Rights of All Existing Claimants.

A second concern for the *Mays* court appeared to be that certain water rights on a given water system would be left unadjudicated by the summary supplemental adjudication proceedings. If parties existed whose water rights were left unadjudicated, then it would be unfair to hold that such parties were bound by a decree issued in a suit that they were not party to. The *Mays* court indicated that the question would be different if the water decree had been obtained in a statutory proceeding, “which provided for an adjudication of the rights of all existing claimants, upon service of process as directed by statute.” *Mays*, 34 Idaho at 208 (emphasis added).

As discussed in the section above, the *Eagle Decree* proceedings were an adjudication of all existing water right claimants in the Snake River Basin water system above Milner Dam. The Court's Findings of Fact with respect thereto states:

That the parties Plaintiff herein comprise all persons diverting water from, and claiming or asserting rights to divert water from, the Snake River and its tributaries above Milner Dam and within the boundaries of said Water District No. 36, according to the records of and file[s] of defendant Henry Eagle; and comprise, collectively, all presently known parties who are or will be affected by the entry of the Supplemental Decree to be entered herein.

See Exhibit E to *Thompson Aff.* (emphasis added).

Additionally, the decree was intended to be a “common, fair, equitable and just plan designed to result in the most efficient, fair and complete beneficial use of all of the waters of the Snake River and its tributaries.” *Id.* (emphasis added). Thus, in the *Eagle Decree* proceedings, the concern of the *Mays* Court that some water rights in the system would be unadjudicated was fully alleviated, because the proceedings gave due process notice to all persons who might have been affected and joined all interested persons as parties to the action.

This is also in accordance with the current statutory definition of a general adjudication. Under the current statutory scheme, a general adjudication involves a judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho and for the administration of those rights. See I.C. § 42-1401A(5) (emphasis added).

Therefore, once the process and results are examined, it is clear that the *Eagle Decree* is a general adjudication decree, which is now immune from collateral attack by those claiming that they were not parties to the original proceedings. After all, the parties to the *Eagle Decree* had the right to assume that the adjudication could not be disturbed and the rights to use the water not be changed to their detriment. To hold otherwise would render the water rights, although

previously adjudicated, of such an uncertain nature that they would be of little value. *See The Farmers' Union Ditch Company et al.*, 37 Colo. at 517 (Colorado 1906).

3. Although Issued Pursuant to the Supplemental Adjudication Statute, the *Eagle Decree* Proceedings Resulted in a *De Facto* General Decree.

The process that led to the Eagle Decree satisfied the requirements of a general adjudication and therefore (just like a deeded property right) the rights set forth in the Eagle Decree are binding against all, not merely on those who were parties to the decree.

Idaho Code § 42-1401A(5) defines a general adjudication as “an action both for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system, except as provided in section 42-1420, Idaho Code, and for the administration of those rights.” I.C. § 42-1401A(5) (emphasis added). Thus, according to statutory definition, a general adjudication involves: 1) a judicial determination of the extent and priority of the rights of all persons to use water in a given water system, and; 2) a judicial determination for the administration of those rights. A decree issued pursuant to a general adjudication is conclusive as to the nature and extent of the water right. I.C. § 42-1420.

Since, as discussed above, the *Eagle Decree* was a judicial determination of all the water rights in the Snake River above Milner Dam and a plan for the administration of said rights, it is a *de facto* general adjudication. There was no more water then, or now, to divide among the public. This is especially true concerning water to fulfill those senior rights adjudicated over 40 years ago.

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- a. **The Eagle Decree was a judicial determination of the extent and priority of the rights of all persons to use all the water from the Snake River Basin with Points of Diversion at Milner Dam or above.**

The *Eagle Decree* is a *de facto* general adjudication because it determined the rights of all water right holders in the basin. The decree encompassed the water rights of all persons claiming or asserting said rights and joined all persons who are or would be affected by its entry. See Ex. E to *Thompson Aff.*

- b. **The *Eagle Decree* constituted a judicial determination for the administration of the rights in the Snake River Basin above Milner Dam.**

Moreover, the *Eagle Decree* constitutes a judicial determination for the administration of the water rights therein. As correctly noted by the United States, the Eagle Decree became “the common plan for administering the operation of the Snake River.” *Reclamation Br.* at 6.

- c. **The *Eagle Decree* proceedings satisfied all due process requirements.**

As discussed in Part VII.A.2 above, appropriate notice was published regarding the nature and pendency of the Eagle Decree proceedings, and all known water users were joined in the action. Such notice fully satisfied the requirements of due process. See *LU Ranching Co., v. United States*, 138 Idaho 606; *Ross v. Belcher*, 79 Idaho 473, 479 (1958). It follows, therefore, that the court has the authority to bind all those who received either constructive or actual notice, regardless of whether they chose to appear and defend. See *LU Ranching Co.*, 138 Idaho at 610. For this reason, this Court should find that the *Eagle Decree* proceedings were a *de facto* general adjudication and that the Decree is fully binding to the same extent as any other general decree.

B. The State of Idaho and Reclamation are Parties or Privies to the *Eagle Decree* and Cannot Propose Remarks Inconsistent with its Terms.

Even if this Court agrees with Special Master Dolan and finds that the *Eagle Decree* is only binding on parties and their privies, the State and the Reclamation are still both bound thereby. The remarks proposed by the United States and the State of Idaho differ from the language in the Palisades Contracts which is also incorporated into the *Eagle Decree* itself. This fact is acknowledged by Reclamation in its summary judgment brief. Speaking to Minidoka water rights nos. 01-00217 and 01-00218 it has stated:

This remark is *effectively* the portion of the Palisades contract that relates to how the exercise of the senior Minidoka power rights will be limited, *with obsolete and unnecessary terms removed*.”

Reclamation Br. at 8-9 (*emphasis added*). As to the Palisades water right, Reclamation acknowledged that:

This provision is *almost* a word-for-word reiteration of the relevant contract provision. *The only two changes are non-substantive*: (1) the implication in the contract that it is the Secretary who will determine when it appears that the reservoirs will fail to fill has been made explicit; and (2) the amount of water needed for firm power production has been converted to cubic feet per second rather than the kilowatt-hours per month used in the contracts.

Id. at 10 (*emphasis added*).

While Reclamation requested that an additional remark be included which states that the above remarks will not affect the Palisades contracts, it is impossible to unilaterally change the language of the contracts – as judicially confirmed in the *Eagle Decree* – without affecting the underlying contracts. This the State of Idaho and the United States cannot do, because this unilateral attempt to modify the Palisades Contracts would amount to a breach of contract by the U.S. and because, despite the assertion to the contrary, they are bound by the *Eagle Decree*.

C. The Watermaster in Water District 01 is bound to administer water rights in accordance with the *Eagle Decree*.

As a practical matter, the *Eagle Decree* cannot be undermined because the watermaster is bound to distribute water in accordance with its terms. This assertion rests on two independent bases. First, Henry Eagle, who was the watermaster over Water District 36 (now Water District 01) at the time of the *Eagle Decree* adjudication, was a party to the *Eagle Decree* adjudication. He was represented by the Attorney General for the State of Idaho. The fact that he was also an employee of the U.S. Geological Survey makes no difference. *Order* at 13. In his Disclaimer entered in the Fremont County proceeding, Mr. Eagle represented as follows:

COMES NOW, HENRY EAGLE, Watermaster of Water District No. 36, State of Idaho, by and through his attorneys of record, Allan G. Shepard, Attorney General of the State of Idaho, and William D. Collins, Assistant Attorney General of the State of Idaho, and states that he has no right adverse to and disclaims any and all interest adverse to the claims by the Plaintiffs in this action, *and that he will abide by and consider as binding upon him the decree of the court as entered in this action.*

Ex. M to *Thompson Aff.* (emphasis added).

As such, Henry Eagle (in his capacity as watermaster) is bound to distribute water in accordance with the terms of the decree. Therefore, his successor in interest is similarly bound to distribute water in accordance with the terms of the *Eagle Decree*. See *Restatement 2d of Judgments* §§ 43, 75; *Morgan v. Udy*, 58 Idaho 670 (1938); *Adams v. Nampa & Meridian Irrigation District*, 73 Idaho 521 (1953). Accordingly, as to the watermaster charged with distributing the waters of the Snake River above Milner, the *Eagle Decree* is *res judicata* and he is bound thereby.

Additionally, it is the duty of the watermaster to distribute waters in accordance with the respective rights of the appropriators. I.C. § 42-607; *Nampa & Meridian Irrigation Dist. v. Barclay*, 55 Idaho 13 (1935). The State of Idaho correctly articulates the existence of this duty.

See State Br. at 9. “Water District No. 1 is required by statute to administer water rights in accordance with the prior appropriation doctrine.” However, it ignores the fact that the respective rights of the appropriators are all set forth in the *Eagle Decree* and so it is the *Eagle Decree* that defines the duty. Remarks that are inconsistent with the *Eagle Decree* are also inconsistent with the watermaster’s statutory duty.

Thus, as a successor in interest to Henry Eagle, the Water District 01 Watermaster, and through him the State of Idaho, is bound to honor the terms of the *Eagle Decree*. Similarly, he has a statutory duty to distribute water in accordance with the terms of the decree. For these reasons, the remarks approved by Special Master Dolan on summary judgment are erroneous and cannot be given any effect by the Watermaster, as they would constitute an unlawful abrogation of the watermaster’s statutory duty.

D. The United States is bound by the *Eagle Decree* and its Palisades Contracts and cannot propose remarks that are inconsistent with their language.

1. The United States is in Privity with the parties to the *Eagle Decree* and is bound thereby.

It is well established that a judgment or decree is binding on parties to the judgment and on those in privity with the parties. *Ticor Title Co. v. Stanton, II*, 144 Idaho 119, 124 (2007). Furthermore, where a party’s interests are represented, a water adjudication decree will be binding on that party, even though it was not a named party in the adjudication. *See Nevada*, 463 U.S. at 135.

The United States asserted the untenable position that it was not a party to the *Eagle Decree* and is not bound by its provisions. While it is true that the United States was not named as a party, this argument ignores the history of the relationship between the United States and the parties to the *Eagle Decree* and the relationship of the United States to the decree itself. Indeed,

Special Master Dolan's *Order* overlooked the evidence in the record and the purpose behind the *Eagle Decree* proceeding, including Reclamation's involvement.

Through the Palisades Contracts, the United States contracted with most of the parties to the *Eagle Decree*. See Exs. F, G, H, I to *Thompson Aff.* (Burpee Letters) (specifically, July 25, 1966, Letter from William Burpee to John Rosholt w/tabulation attached showing contracting entities, contract numbers, and contract dates by grouping). The *Eagle Decree* was litigated and entered in large part to confirm by decree various provisions of these Palisades Contracts, and the United States was fully involved in the drafting, negotiation and creation of the *Eagle Decree*.

The close relationship of the United States to the parties to the *Eagle Decree* and Reclamation's full involvement in the proceedings is evident from the letters regarding the Decree between William Burpee (Burpee), then Field Solicitor for the United States Department of the Interior and John Rosholt (Rosholt), one of the attorneys who represented certain parties to the *Eagle Decree*.

Notably, as indicated in the letters from Burpee to John Rosholt, Burpee requested, reviewed, and commented on the Complaints filed by the Plaintiffs in both the Twin Falls County and Fremont County proceedings. See Ex. F, G, H, I to *Thompson Aff.*; Burpee Letters. By letter of September 9, 1967, Reclamation even requested language to ensure the contracts it entered into would be ratified in total by the Court:

It also occurs to me that perhaps in line with the recitations in the draft of the proposed Stipulation indicating that the Palisades contracts were entered into on the basis of a common plan for the administration of the waters of the Snake River, it may be desirable to broaden paragraph XVII to make it applicable to all the provisions of those contracts. . . . By having the Stipulation refer to the entire contracts there would be avoided any future attempt to set up a strained interpretation out of the isolated language used in the provisions pointed up particularly in the decree.

See Exhibit I to Thompson Aff.; Burpee 09/06/1967 letter to Rosholt.

Finally, the Plaintiffs amended the exhibits included to the *Eagle Decree* at

Reclamation's request:

Pursuant to our telephone conversation of yesterday, we have amended Exhibit "E" to include all of paragraphs 21 through 24, plus 25, 26, and 27. . . .

I have enclosed a copy of your letter of September 6, 1967, wherein you point out that you felt the only articles we need to call attention to were Articles 21, 22, and 27 of the Minidoka Irrigation District contract. This was the guideline I used in attempting to prepare the exhibit in the first instance. Since you now think that Articles 23 and 24 should be included, we will include them.

In addition, we have amended page one of the Findings of Fact and Conclusions of Law, eliminating that portion in parenthesis which recites "and its tributaries" and have adjusted the language in what was formerly lines 23 and 24 in accordance with your suggestions.

See Ex. J to Thompson Aff.; Rosholt 9/09/1968 letter to Burpee.

These letters are but a snapshot of the United States' involvement in the *Eagle Decree* proceedings; however, they clearly indicate the depth of its involvement in the proceedings.

Without a doubt, the United States was a nonparty in name only, especially in light of the fact that it was in contractual privity with the parties, and, just like the Paiute Tribe in the *Nevada* case, the United States' interests were fully represented during the *Eagle Decree* proceedings.

Furthermore, in the *Eagle Decree* proceedings, all parties stipulated and agreed that prior decrees to the Snake River, namely the *Rexburg Irrigation Co. et al. v. Teton Irrigation Co. et al.* decree, the *Twin Falls Canal Company v. Charles N. Foster* decree, and the *Woodville Canal Company v. Clark & Edward Canal and Irrigating Company et al.* decree were "binding on all parties" to the proceeding. *See Ex. C to Thompson Aff.*; Complaint at 2.

The United States was a named party to the *Foster Decree* and to the *Woodville Decree*. *See Exhibit C to Thompson Aff.* Therefore the water rights claimed by the United States in

Woodville and *Foster* were reaffirmed in the *Eagle Decree*. For these reasons, the United States is bound to the language of the *Eagle Decree* both because it is in privity with the parties to the Decree and because its interests were represented.

2. The United States is Bound by Contract.

An attempt to unilaterally modify the terms of a contract is breach. See *M.K. Transp. v. Grover*, 101 Idaho 345 (1980). As discussed above, the United States has contracted with various parties to the *Eagle Decree*. Although it has stated that its proposed remarks would not affect the contracts, it is clear that such a position is untenable, because the remarks are different than the language of the Palisades Contracts and have been interpreted to mean different things by the various Directors and Watermasters charged to oversee and administer the water rights. Furthermore, Reclamation has not sought permission, approval or ratification by the various parties to the contracts. See *Temple Aff.* at 7, ¶ 18; *Bingham Aff.* at 5, ¶ 13; *Sorensen Aff.* at 5, ¶ 10. For this reason, the United States cannot propose remarks that differ from the language of the Palisades contracts, because to do so amounts to breach of contract.

Finally, as pointed out at length above, the *Nevada* case holds that the United States and its beneficiaries under the reclamation laws are in privity, and thus each is bound by the appearance of the other.

VII. The Proposed Remarks Do Not Meet the Statutory Standards of I.C. § 42-1411 Concerning Modification of Elements Recommended in a Director's Report and "Necessary" Inclusion of a Remark.

The Court should reverse Special Master Dolan's *Order* because the approved remarks do not meet the statutory standards of I.C. § 42-1411 regarding water rights elements and remarks. Pursuant to I.C. § 42-1411(2), the Director must determine specified "elements . . . to define and administer the water rights acquired under state law." Among the elements specified

for determination by the director are “such remarks and other matters as are necessary for the 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).

In this instance, the Director recommended remarks in the Director's Report for the water rights claimed by Reclamation for power purposes both at Minidoka Dam and Palisades Dam. As the State observed in its summary judgment brief, the Director's Recommendations for these federal water rights included the “[*Eagle Decree*] winter power operation remark” and the “historic practices hydropower [subordination] remark.” *See State Br.* at 2-3.

The Director's Recommendations for water rights 1-217, 1-218, 1-4024 and 1-4025 for power purposes at Minidoka Dam included, under the heading “Other Provisions Necessary for Definition / Administration of this Water Right” the following *Eagle Decree* 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).

The Director's Recommendations for these water rights, and for Reclamation's rights at Palisades Dam, water right nos. 01-02068 and 01-04054, included under the Priority Date element the following historic practices hydropower subordination remark:

The appropriator shall exercise this right in a 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.

Through their summary judgment motions, the State and Reclamation sought to eliminate the *Eagle Decree* winter power operation remark and the historic practices hydropower

subordination remark recommended by the Director, and to substitute in their places new language derived by selectively editing provisions of the *Eagle Decree*. Special Master Dolan granted the motions and the proposed remarks.

Despite the Special Master's decision, modification of Director's Recommendations cannot be so easily accomplished. Under I.C. § 42-1411(5), a claimant or objector challenging the Director's determination of water right elements including remarks has the burden of going forward with evidence rebutting the Director's recommendation:

[A] claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report. Any party filing an objection to any portion of the director's report shall have the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection.

In this instance, Reclamation as claimant of the power water rights at Minidoka and Palisades, and the State as an objector (*see, e.g.*, State Objection re water right no. 01-02068) have failed to satisfy the evidentiary burden they must meet in order to substitute the proposed remarks in place of the Director's Recommendations. The Court should reverse Special Master Dolan's summary judgment decision on this basis.

In addition, the State and Reclamation have failed to meet the statutory standard for inclusion of a remark as a water right element. Under I.C. § 42-1411(2)(j), a remark may be included in a decree where "necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." An examination of how the State and Reclamation have eliminated, modified, supplemented and essentially replaced contract provisions adopted as part of the *Eagle Decree* makes it evident that their proposed remarks are not "necessary" for definition, clarification or administration of the water rights.

With respect to operation of Minidoka dam, the State and Reclamation seek to modify the *Eagle Decree* language as follows [the proposed omissions in ~~strikeout~~ and additions in **double underscored bold font**]:

The United States, in its operation of American Falls and Minidoka dams during the storage season of each year is required to pass through enough water to satisfy existing diversion rights in the stretch of river down to and including Milner Dam and certain power rights below Milner Dam, and has the privilege under an existing decree **While the United States has the privilege** to use at Minidoka Dam 2,700 cfs cubic feet per second of water for the development of power. While the United States must operate the American Falls and Minidoka dams so as not to interfere with these third-party rights, **under water right nos. 01-00217 and 01-00218**, it will be the objective of the United States in the operation of both its American Falls and Minidoka powerplants to curtail the release of additional water from American Falls Reservoir **the Minidoka powerplant to limit the exercise of water right nos. 01-00217 and 01-00218** for power production at those powerplants during the storage season of any year whenever operation of those powerplants **the Minidoka powerplant whenever operation of the Minidoka powerplant** to the full extent of their respective **these** water rights for power production would result in loss of irrigation water otherwise storable in the reservoir system. Accordingly, except as it is determined by the Secretary that additional water may be passed through American Falls and Minidoka dams **Dam** without the loss of water that could be stored for irrigation in the reservoir system, the United States has, during each storage season beginning October 1, 1952, and ending in 1958, and will, commencing with the storage season of 1958-1959 and continuing so long as the provisions of (c) of this article remain operative, **will** limit the release of water through the **Minidoka Dam**, those dams as follows:

To the amount of water required to provide flows below Minidoka Dam sufficient to meet existing diversion rights in the reach of the river through Milner Dam and the power rights required to be recognized under the provisions of the contract of June 15, 1923, between the United States and the Idaho Power Company (Symbol and No. 11r 733), as those diversion and power rights may be modified from time to time.

To the extent that it is practicable to do so, the **Watermaster and the Water District 1** Advisory Committee and the District 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.** limitations; and that Committee will be furnished written reports as of the close of the storage season of each year showing, among other things, the releases actually made and the minimum releases required to be made.

Ex. E to *Stanish Aff.*, (*Eagle Decree*, Ex. E at 28-30).

With respect to operation of Palisades Reservoir, the State and Reclamation seek to modify the *Eagle Decree* provisions as follows:

~~The~~ During any storage season, the United States, after consultation with the Watermaster and the Water District & Advisory Committee, may release stored water from Jackson Lake and Palisades reservoirs for the maintenance of power production at Palisades ~~Dam~~ dam powerplant and may store such water, as Jackson Lake or Palisades water as the case may be, in American Falls Reservoir. The release of such water will be confined, however, in storage seasons 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 water required for the maintenance of a minimum firm power production (estimated to be about 11,000,000 kilowatt hours per month at an average production of 15,000 kilowatts) and that amount which can be stored in American Falls Reservoir; and no 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.

Ex. E to *Stanish Aff.*, (*Eagle Decree*, Ex. E at 39).

The *Eagle Decree* "confirmed, ratified and approved" the "common plan for the administration of the operation of the Snake River" by incorporating certain contract provisions into the decree and making them "binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam." Ex. E to *Stanish Aff.*; *Eagle Decree* at 19. As demonstrated above, the proposed remarks of the State and Reclamation essentially rewrite these provisions of the *Eagle Decree*, which for 40 years has guided project operations pursuant to the common plan for administration. If anything, the remarks approved in the *Order* will result in confusion, inconsistency and unpredictability in administration of the water rights – the exact opposite of the standard for inclusion of remarks. The Special Master's

summary judgment order should be reversed on the basis that the remark fails to meet the standard for "necessity" of remarks under I.C. § 42-1411(2)(j).

The federal reservoirs have been legally operated and administered in accordance with the contract provisions and the "common plan" ratified and confirmed by the *Eagle Decree* for the past 40 years. The State and Reclamation have demonstrated no reason or need to change that common plan of operation, and the *Order* provides no justification to do so now. As such, the hydropower water rights associated with the Minidoka and Palisades projects should be decreed in accordance with administration and accounting principles embodied in the contract provisions ratified and confirmed by the *Eagle Decree*.

To the extent that the federal reservoirs have not been administered at all times pursuant to the applicable provisions of the *Eagle Decree*, the SRBA Decree is not the place to "lock in" such improper operation. Since the Water District 01 Watermaster was a defendant in the *Eagle Decree* proceedings, he and the other parties involved as well as their successors are bound by the decrees with respect to water rights administration and use. "Because the watermaster is a ministerial officer, he is authorized to distribute water only in compliance with applicable decrees." *Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972). Moreover, the water rights of users served by the federal reservoirs cannot be diminished by considerations of historic operations such as those apparently relied upon by the State and Reclamation, irrespective of applicable decree provisions. "The holders of water rights are entitled to presume that the watermaster is delivering water to them in compliance with the priorities expressed in the governing decree." *Almo Water Co.*, 95 Idaho at 21.

In essence, the State and Reclamation have fashioned their own administrative provisions for water rights which instead are properly part of a judicially decreed "common plan" affecting

all water rights served by federal reservoir projects. Specifically, they have ignored and disregarded the beneficial interests of the irrigation districts and their landowners that used the power generated by Reclamation in order to irrigate their lands. The private or piecemeal approach proposed by the State and Reclamation in this case is impermissible, as explained by the SRBA Court:

Historical practices notwithstanding, the Court is not compelled to decree a general provision based on historical administrative practices to the extent such practices are determined to be contrary to law or authorize the administration of rights in a ‘vacuum’ without regard for other rights that are part of the same hydrologic system, i.e., the ‘sweetheart decree.’

Ex. P to *Thompson Aff.* at 2 (“Order of Partial Decree for General Provision in Basin 31 Regarding Obstructions in Camas Creek and Tributaries,” *In re SRBA Case No. 3956*, 8 SRBA 1 (2004)).

Accordingly, the State and Reclamation may not stipulate to proposed remarks that only they deem are necessary and further seek to obtain administration of certain federal project water rights without regard to the effects of such administration on other parties. In this case the State and Reclamation, and the Special Master by his *Order*, have disregarded the interests of the irrigation districts that rely upon reserved power produced by these water rights. “Parties can stipulate as to how their rights should be administered *so long as* the rights of other water right holders not made a party to the proceedings are unaffected.” *Id.* at 4 (emphasis added).

By approving the agreed upon remarks between the State and Reclamation, the Special Master wrongly disregarded the interests of the Coalition and other water right holders that have relied upon the “common plan” of administration set forth in the *Eagle Decree*. The *Order* should be reversed accordingly.

VIII. The Order's Expanded Subordination of the Senior Minidoka Power Rights is Contrary to State & Federal Law.

A. The Order is Inconsistent with the Reclamation Act's Power Lease Authorizations.

The Minidoka Project and its various facilities were authorized under the Reclamation Act of 1902, and subsequent Acts of Congress, for irrigation and power purposes. Indeed, Reclamation's claims in the SRBA reflect these same purposes. Ex. E to *Fletcher Aff.*; Rigby Depo. at 42-3; 143-44. When read in its entirety, the Reclamation Act emphasizes the importance that is placed on preserving the reclamation projects as "irrigation" projects.

Whenever the development of power is necessary to irrigate a reclamation project, that power is reserved for the irrigation of that project – i.e. "reserved power." See e.g., *Temple Aff.* ¶¶ 13-14; *Sorensen Aff.* ¶¶ 5-6. In essence, "reserved power" is purchased by the irrigating entity at the rate that it costs Reclamation to produce the power. *Id.* This can be a significant savings on power costs – especially where some projects spend millions of dollars every year on power usage. *Temple Aff.* ¶¶ 15-16.

The Reclamation Act provides additional protection to irrigators when dealing with surplus power. If there is surplus power, the Act allows Reclamation to lease that power. 43 U.S.C. § 522. However, "***no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project.***" *Id.* (emphasis added).

Reclamation's authority in operating its power plants is limited. Reclamation cannot impair the efficiency of the irrigation projects and cannot ignore the right to reserved power at the cost of production. As such, when changes were necessary to allow for the construction of Palisades Dam, an agreement was required to address impacts on the statutory right to receive reserved power at the cost of production. The power loss payment program was implemented to

ensure that entities that rely on the reserved power, such as A&B, BID, and FID, would not be prejudiced. *See Temple Aff.* ¶¶ 11-16; *Sorensen Aff.* ¶¶ 5-6. As such, under the Palisades Contracts, the rights of those relying on reserved power are preserved.

Expanding the scope of subordination under the Palisades Contracts threatens the statutory rights of those who rely on reserve power by increasing the cost of reserved power.

B. The *Order* is Contrary to Idaho Law.

Idaho law is very particular about how a power right may be subordinated and the process that must be followed. In this case, the Special Master's *Order* authorizes changes to the priority element of the decreed power water rights contrary to that statutory process.

First, by changing the water rights from being subordinate to “irrigate storage” to being subordinated to any water rights for “water otherwise storable,” the *Order* effects a transfer of the water right – i.e. a change in an elements of the water rights. As the Special Master stated, the power rights would no longer be subordinated solely to “irrigation storage.” Rather, “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.” *Order* at 12 (emphasis added). The end result of these changes drastically alters the consideration granted by the spaceholders when they agreed to subordinate the power rights only to irrigation storage. In short, removing the word “irrigation” from the proposed remark will allow for additional uses that “go beyond” the *Eagle Decree*. *See Ex. C. to Fletcher Aff.* (Tuthill Depo. at 62-63; 121-23).

Idaho Code § 42-222 addresses the procedure to transfer a water right. It requires that an application be filed with the Department. A hearing process is then commenced – giving interested parties the opportunity to protest the proposed transfer. Here, no such application was

filed and the Coalition was not afforded an opportunity to challenge the requested change pursuant to Idaho Code section 42-222. As such, the attempt to alter the water rights by expanding the subordination is unauthorized. In addition, Reclamation is obligated under Section 8 of the Reclamation Act to acquire water rights pursuant to state law. 43 U.S.C. § 383. It must also follow state law to change or amend such rights.

Likewise, Idaho Code § 42-203B addresses the Director's authority to subordinate. Importantly, the Director has no authority to subordinate a pre-1985 power right absent an agreement. I.C. § 42-203B(1), (3); *see also Id.* at § 42-203B(6) (the authority of the Director to "subordinate the rights granted in a permit or license for power purposes ... *shall not apply* to licenses which have already been issued as of the effective date [July 1, 1985] of this act") (emphasis added). Any agreement to subordinate a pre-1985 power right "shall be subject to ratification by law." I.C. § 42-203B(5). Here, there is no "agreement" to subordinate by the reserved power customers that rely upon Reclamation's power water rights. Likewise, there has been no "ratification by law." As such, the *Order*'s overly broad subordination expansion violates Idaho law and should be reversed.

IX. The *Order* Subordinates Reclamation's Beneficial Use Minidoka Power Water Rights Without Any Basis in Law.

In submitting its beneficial use claims for water rights 01-4024 and 01-4025, Reclamation did not claim that the rights should be subordinated. These claims, which were made under oath, did not seek any subordination. There is nothing in the law that supports the unilateral subordination of a constitutional beneficial use claim without factual or legal support. Furthermore, since water right 01-4024 pre-dates the 1928 amendment to the Constitution, which gave the State of Idaho the right to regulate the appropriation of water rights, *see supra*, IDWR has no right to attempt to subordinate the water right.

X. Any Provision Included on Reclamation's Water Rights Should Recognize and Affirm the Rights Are Subject to the Provisions of the *Eagle Decree*.

The Director's recommendation for the water rights in these subcases includes the following remark under the "Other Provisions Necessary" section that attempts to reference the provisions of the *Eagle Decree*:

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).

As detailed above, Reclamation's exercise of water rights 1-217 and 1-218 at the Minidoka power plant has been and is currently subject to *Eagle Decree*. Accordingly, the Director's remark that indicates they "may" be subject to that decree is inaccurate and creates ambiguity. Moreover, this tenuous remark does not clarify or define the water rights.

As described above, the Watermaster for Water District 01 is bound to distribute water in accordance with the provisions of the *Eagle Decree*. The State's witnesses admitted that the Watermaster is bound to distribute water in accordance with those decrees. *See* Ex. B to *Fletcher Aff.*; Spackman Depo. at 21-22; Ex. C to *Fletcher Aff.*, Tuthill Depo. at 33. Lyle Swank further testified that it was his understanding that water rights in Water District 01 have been administered pursuant to the *Eagle Decrees* since at least 1978. *See* Ex. D, *Fletcher Aff.*; Swank Depo. at 12-13. Finally, Reclamation's witness Rich Rigby further admitted that the exercise and administration of those water rights is subject to the contracts which were incorporated into provisions of the *Eagle Decree*. *See* Ex. E, *Fletcher Aff.*; Rigby Depo. at 47-48. Therefore, given the actual history and existing operations of Reclamation's water rights, if any provision is necessary, the following language accurately describes the provisions that were previously

decreed and which govern the use of those water rights today (proposed modification of Director's provision):

The delivery of water to this right ~~may~~ shall be subject to the provisions for ~~winter power operation at the Minidoka power plant as recognized in~~ of 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).

The above provision clarifies and affirms the Watermaster's and Reclamation's continuing obligations to operate the Minidoka and Palisades power water rights (1-217, 1-218, 1-2068, and 1-4054) consistent with the *Eagle Decree*. Therefore, if the Court seeks to decree a "provision necessary for administration" in this matter on summary judgment, the facts and law support the above provision. Therefore, if the Court determines that it should decree a provision in this matter on summary judgment *sua sponte*, as authorized by the Idaho Court of Appeals in the case of *Peterson v. Shore*, 146 Idaho 476, 197 P.3d 789 (Idaho App. 2008), the provision set forth above is the only provision supported by the facts and law.

As to the remaining proposed remarks affecting the complete subordination of the junior priority water rights at the Minidoka and Palisades powerplants (1-4024, 1-4025, and 1-4054), there is no basis to grant summary judgment given the history of these water rights and the disputed issues of fact set forth above.

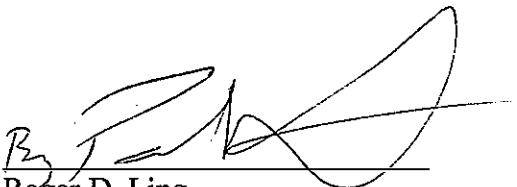
CONCLUSION

The Special Master erred in granting summary judgment on the agreed to remarks for Reclamation's water rights at the Minidoka and Palisades powerplants. As explained in detail above, the 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 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 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 genuine issues of material fact exist and that the remarks approved by Special Master Dolan's *Order* do not "clarify" the rights for administration.

In summary, the Court should reverse Special Master Dolan's order on summary judgment, or, alternatively, decree the provision set forth above to ensure these water rights are exercised pursuant to the Palisades Contracts and *Eagle Decrees* in the future.

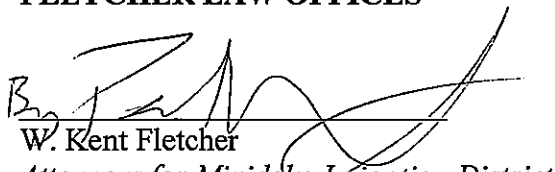
DATED this 7th day of October, 2010.



Roger D. Ling

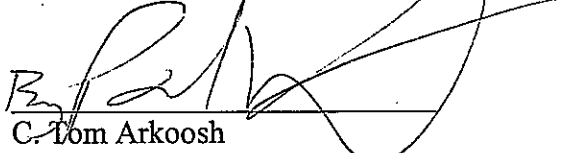
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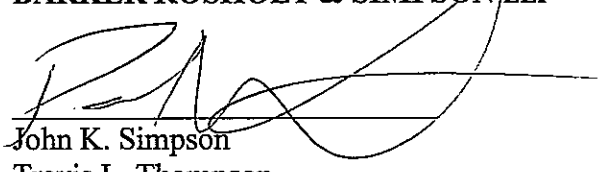
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2010, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S JOINT OPENING BRIEF ON CHALLENGE** on the following by the method indicated:

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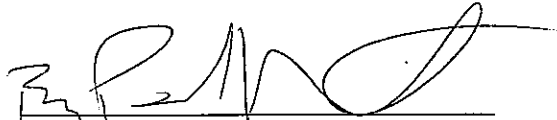
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