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DEPARTMENT OF
WATER RESOURCES

The State of Idaho, by and through the undersigned deputy attorney general, hereby submits this brief in response to the Power Interests' Joint Opening Brief on Challenge filed in the above-entitled subcases.

TABLE OF CONTENT

I.	PROCEDURAL BACKGROUND.....	1
A.	DIRECTOR’S RECOMMENDATIONS	1
	i. MINIDOKA POWER RIGHTS	1
	ii. PALISADES POWER RIGHTS.....	1
B.	MOTIONS FOR SUMMARY JUDGMENT	2
	i. MINIDOKA POWER RIGHTS	2
	a. Water Right Nos. 01-00217 and 01-00218	2
	b. Water Right Nos. 01-04024 and 01-04025	3
	ii. PALISADES POWER RIGHTS.....	3
	a. Water Right No. 01-02068	3
	b. Water Right No. 01-04054.....	4
	iii. SUPPORTING PARTIES	4
	iv. OBJECTING PARTIES	5
C.	SPECIAL MASTER'S REPORT AND RECOMMENDATION	5
D.	CHALLENGE TO SPECIAL MASTER'S REPORT AND RECOMMENDATION	5
II.	FACTUAL BACKGROUND.....	5
III.	ARGUMENT.....	8
A.	AS THE SOLE CLAIMANT AND OWNER OF THE MINIDOKA AND PALISADES HYDROPOWER WATER RIGHTS, THE UNITED STATES IS FREE TO VOLUNTARILY LIMIT ITS RIGHTS.	9
	i. THE POWER INTERESTS ASSERTION OF AN OWNERSHIP INTEREST IN THESE HYDROPOWER WATER RIGHTS IS BEYOND THE SCOPE OF THEIR OBJECTIONS.....	10
	ii. THE USBOR OWNS THE MINIDOKA AND PALISADES HYDROPOWER WATER RIGHTS WITHOUT QUALIFICATION	10

iii. IDAHO LAW ALLOWS FOR VOLUNTARY SUBORDINATION OF WATER RIGHTS.....	12
B. THE POWER INTERESTS' ATTEMPT TO MAKE SUBORDINATION OF THESE WATER RIGHTS CONTINGENT UPON CONTINUED POWER LOSS PAYMENTS IS CONTRARY TO LONG-STANDING RECLAMATION LAW AND <i>BURLEY IRRIGATION DISTRICT V. ICKES</i>	14
i. HYDROPOWER GENERATION AT RECLAMATION PROJECTS, SUCH AS THE MINIDOKA AND PALISADES PROJECTS, WAS SUBORDINATED AS A MATTER OF RECLAMATION LAW LONG BEFORE THE PALISADES CONTRACTS EXISTED	14
ii. THE EXPLANATORY REMARKS EXPRESSLY PROTECT THE POWER INTERESTS' CONTRACTUAL RIGHTS TO THE POWER LOSS PAYMENTS	18
iii. AN EXPLANATORY REMARK DICTATING CONTINUED POWER LOSS PAYMENTS IS BEYOND THE SCOPE OF WATER RIGHTS ADMINISTRATION AND IS NOT NECESSARY FOR THE ADMINISTRATION, CLARIFICATION, OR DEFINITION OF THESE WATER RIGHTS.....	18
C. THE POWER INTERESTS WRONGFULLY ASSERT THAT THE TWO SENIOR MINIDOKA WATER RIGHTS ARE SUBORDINATED ONLY TO IRRIGATION STORAGE RATHER THAN TO THE OPTIMIZATION OF TOTAL STORAGE IN THE RESERVOIR SYSTEM.....	20
i. THE USBOR DEVELOPED THESE WATER RIGHTS UNDER THE PRINCIPLE THAT THE RESERVOIR SYSTEM IS OPERATED TO OPTIMIZE TOTAL STORAGE IN THE SYSTEM WITHOUT DIFFERENTIATING AMONG THE VARIOUS STORAGE PURPOSES.....	21
ii. SUBORDINATION OF THE TWO SENIOR MINIDOKA HYDROPOWER WATER RIGHTS TO ALL STORAGE IS CONSISTENT WITH HISTORIC EXERCISE OF THESE WATER RIGHTS	22
D. IT IS NOT NECESSARY TO INCORPORATE THE ENTIRETY OF THE EAGLE DECREES IN ORDER TO RESOLVE THE OBJECTIONS AND RESPONSES TO THE "HISTORIC PRACTICES HYDROPOWER REMARK" AND THE "WINTER POWER OPERATION REMARK".....	23
i. THE POWER INTERESTS ASSERTION THAT THE ENTIRETY OF THE EAGLE DECREES MUST BE INCLUDED IN THE PARTIAL DECREES FOR THESE WATER RIGHTS IS BEYOND THE SCOPE OF THEIR OBJECTIONS.....	23
ii. IT IS NOT NECESSARY FOR ADMINISTRATION TO INCLUDE EVERYTHING IN THE EAGLE DECREES	24
iii. THIRD-PARTY INTERESTS ARE NOT PREJUDICED BY THE REMARKS RECOMMENDED BY THE SPECIAL MASTER	25

E. THE EAGLE DECREES ARE NOT BINDING ON THE STATE BECAUSE THE STATE WAS NOT A PARTY THERETO AND THE ADJUDICATIONS WERE NOT GENERAL STREAM ADJUDICATIONS.....	26
F. SUMMARY JUDGMENT IS NOT PRECLUDED JUST BECAUSE THE STATE, THE USBOR, AND IDWR AGREED TO REMARK LANGUAGE THAT DIFFERS FROM THE REMARK LANGUAGE USED IN THE ORIGINAL DIRECTOR’S REPORT.....	30
G. THE STATE’S RELIANCE ON THE TESTIMONY OF THE FORMER AND CURRENT DIRECTOR OF IDWR DOES NOT VIOLATE IDAHO CODE § 42-1401B.....	32
H. THIS COURT SHOULD DECREE THE TWO JUNIOR MINIDOKA POWER RIGHTS REMARKS AS RECOMMENDED BY THE SPECIAL MASTER IN SUBCASE NOS. 01-04024 AND 01-04025 BECAUSE THE POWER INTERESTS HAVE FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT.....	34
I. THIS COURT SHOULD DECREE THE PALISADES POWER RIGHTS REMARKS AS RECOMMENDED BY THE SPECIAL MASTER IN SUBCASE NOS. 01-02068 AND 01-04054 BECAUSE THE POWER INTERESTS HAVE FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT	34
J. THE POWER INTERESTS ARE COLLATERALLY ESTOPPED FROM ARGUING AGAINST THE PRINCIPLE THAT THE SYSTEM IS OPERATED TO OPTIMIZE TOTAL STORAGE IN THE RESERVOIR SYSTEM AND THAT HYDROPOWER GENERATION IS ENTIRELY INCIDENTAL AND SUBORDINATE TO THAT OBJECTIVE.....	35
IV. CONCLUSION.....	37

}

TABLE OF AUTHORITIES

CASES	PAGE
<i>Burley Irr. Dist. v. Ickes</i> , 116 F.2d 529 (D.C. Cir. 1940), <i>cert. denied</i> , 312 U.S. 687 (1941).....	6, 10, 11, 14, 16, 17
<i>Idaho Power Company v. State</i> , 104 Idaho 575, P.2d 741 (1983).....	12
<i>In re Snake River Basin Water System</i> , 115 Idaho 1, 764 P.2d 78 (1988).....	27
<i>Mays v. District Court of Sixth Judicial District</i> , 34 Idaho 200, 200 P. 115 (1921)	28
<i>NW Bec-Corp v. Home Living Serv.</i> , 136 Idaho 835, 41 P.3d 263 (2002)	25, 34
<i>Rodriguez v. Dept. of Corr.</i> , 136 Idaho 90, 29 P.3d 401 (July 11, 2001).....	12, 37
<i>State v. Hagerman Water Right Owners, Inc.</i> , 130 Idaho 736, 947 P.2d 409 (1997).....	28, 29
<i>United Investors Life Ins. Co. v. Severson</i> , 143 Idaho 628, 151 P.3d 824 (2007)	13
<i>Upper Snake River Chapter of Trout Unlimited v. Hodel</i> , 921 F.2d 232 (9th Cir. 1990)	35
CONGRESSIONAL RECORD AND REPORTS	
H.R. Doc. No. 81-720 (2d Sess. 1950) (Supplemental Report at 2).....	7
H.R. Doc. No. 81-720 (2d Sess. 1950) (Supplemental Report at 4).....	7
H.R. Doc. No. 81-720 (2d Sess. 1950) (Supplemental Report at 4, 11)	7
FEDERAL STATUTES	
Pub. L. No. 57-161, 32 Stat. 386 (1902).....	6
Pub. L. No. 59-103, 34 Stat. 117, § 5 (1906).....	7
Pub. L. No. 81-864, 64 Stat. 1083 (1949).....	7
Pub. L. No. 81-864, § 4, 64 Stat. 1083 (1949).....	7

Town Sites and Power Development Act of 1906, Pub. L. No. 59-103, 34 Stat. 116 (1906).....	15
--	----

IDAHO STATUTES

Idaho Code § 42-1411(2)(j)	8, 9, 19, 23
Idaho Code § 42-602.....	8, 33
Idaho Code § 42-230(e)	29

OTHER AUTHORITIES

Affidavit of Anthony Olenichak, <i>In re SRBA Case No. 39576, Subcase no. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Aug. 18, 2009).....	22
Affidavit of Lyle Swank at 2, <i>In re SRBA Case No. 39576, Subcase no. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Nov. 10, 2009)	27
Brief of Appellant, <i>Burley Irr. Dist. v. Ickes</i> , No. 7522 (D.C. Cir. Dec. 8, 1939).....	11, 16
Brief for Appellee at 42-43, <i>Burley Irr. Dist. v. Ickes</i> (D.C. Cir. Jan. 25, 1940).....	16
Brief of Intervenor-Appellees at 18, 25, <i>Upper Snake River Chapter of Trout Unlimited v. Hodel</i> (July 20, 1989).....	35, 36, 37
Decree, <i>Twin Falls Canal Co. v. Foster</i> (Idaho 4th Dist. Ct. June 13, 1913).....	12
Deposition of Anthony Olenichak, <i>In re SRBA Case No. 39576, Subcase no. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Sept. 16, 2009).....	20, 22, 23, 25
Deposition of the Bureau of Reclamation, Testimony of Richard M. Rigby, <i>In re SRBA Case No. 39576, Subcase no. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Oct. 27, 2009)	21, 22
Deposition of the State of Idaho, Testimony of David R. Tuthill, Jr., <i>In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Oct. 22, 2009)	29, 32, 33
Ground Water Districts' Response to the State of Idaho's Motion for Partial Summary Judgment, <i>In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Nov. 3, 2010).	4
Joint Response to Ground User's Motion for Leave to File Amended Objections and Pocatello's Memorandum, <i>In re SRBA Case No. 39576, Subcase Nos. 01-00004 et al.</i> (Idaho 5th Dist. Ct. Oct. 30, 2008).....	10, 24

Notice of Challenge, <i>In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Aug. 12, 2010)	5
Objections, Burley Irrigation District at 2, <i>In re SRBA Case No. 39576,</i> <i>Subcase Nos. 01-00217 & 01-00218.</i> (Idaho 5th Dist. Ct. Apr. 19, 2007).....	32
Objections, Minidoka Irrigation District at 3, <i>In re SRBA Case No. 39576,</i> <i>Subcase Nos. 01-00217 & 01-00218</i> (Idaho 5th Dist. Ct. Apr. 19, 2007).....	32
Objection, Twin Falls Canal Company & North Side Canal Company at 2–3, <i>In re SRBA</i> <i>Case No. 39576, Subcase Nos. 01-00211A.</i> (Idaho 5th Dist. Ct. Apr. 19, 2007)	32
Order Deconsolidating Subcase 00-92026 and Order of Recommitment to Special Masters, <i>In re SRBA Case No. 39576, Subcase Ns. 00-92026.</i> (Idaho 5th Dist. Ct. July 1, 2008)	12
Order Granting Motions for Summary Judgment and Special Master Report and Partial Recommendation, <i>In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Mar. 25, 2010).....	5, 14, 18
Reply Brief in Support of the United States’ Motion for Summary Judgment, <i>In re SRBA Case No. 39576, Subcase no. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Nov. 10, 2009)	22
Supplemental Decree, <i>Burley Irr. Dist. v. Eagle</i> (Idaho 5th Dist. Ct. July 10, 1968) & Supplemental Decree, <i>Aberdeen-Springfield Canal Co. v. Eagle</i> (Idaho 7th Dist. Ct. Mar. 12, 1969).....	8, 11
Supplemental Director’s Report, <i>In re SRBA Case No. 39576, Subcase Nos. 01-00217</i> <i>et al.</i> (Idaho 5th Dist. Ct. Apr. 10, 2008)	9
Surface Water Coalition’s and Idaho Power Company’s Joint Memorandum in Opposition to State of Idaho’s and United States’ Motions for Summary Judgment, <i>In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Nov. 3, 2010)	5
Surface Water Coalition’s Joint Opening Brief , <i>In re SRBA Case No. 39576,</i> <i>Subcase Nos. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Oct. 7, 2010)....	12, 13, 18, 26, 28, 30, 32, 33, 35
<i>The Upper Snake River Basin: A Description of Bureau of Reclamation System</i> <i>Operations Above Milner Dam</i> 32–34 (Jan. 1996).....	17
Upper Valley Water Users’ Response to the State of Idaho’s Motion for Partial Summary Judgment, <i>In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.</i> (Idaho 5th Dist. Ct. Nov. 4, 2010)	5

I. PROCEDURAL BACKGROUND

A. DIRECTOR'S RECOMMENDATIONS

i. MINIDOKA POWER RIGHTS

On December 19, 2006, the Director of the Idaho Department of Water Resources (IDWR) recommended in the name of the United States Bureau of Reclamation (USBOR) water right nos. 01-00217, 01-00218, 01-04024 and 01-04025 for power purposes at the Minidoka Dam. The Director's Recommendations for those rights included the "historic practices hydropower remark" under the Priority Date section and the "winter power operation remark" under the Other Provisions Necessary section as follows:

Priority Date – "historic practices hydropower 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.

Other Provisions Necessary – "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).

ii. PALISADES POWER RIGHTS

On December 19, 2006, the IDWR Director recommended in the name of the USBOR water rights nos. 01-02068 and 01-04054 for power purposes at the Palisades Dam. The Director's Recommendations for those rights included the "historic practices hydropower remark" under the Priority Date section as follows:

Priority Date – "historic practices hydropower 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.

B. MOTIONS FOR SUMMARY JUDGMENT

i. MINIDOKA POWER RIGHTS

On August 17, 2009, the State of Idaho and the USBOR moved for summary judgment, asserting that the following remarks should be substituted for the “historic practices hydropower remark” and the “winter power operation remark” set forth in the Director’s Recommendations for the Minidoka power rights:

a. Water Right Nos. 01-00217 and 01-00218

Priority Date

While the United States has the privilege to use 2,700 cfs for the development of power under water right nos. 01-00217 and 01-00218, it will be the objective of the United States in the operation of the Minidoka powerplant to limit the exercise of water right nos. 01-00217 and 01-00218 for power production at the Minidoka powerplant whenever operation of the Minidoka powerplant to the full extent of these water rights for power production would result in loss of water otherwise storable in the reservoir system. Accordingly, except as it is determined by the Secretary that additional water may be passed through Minidoka Dam without the loss of water that could be stored in the reservoir system, the United States will limit the release of water through the Minidoka Dam. To the extent that it is practicable to do so, the Watermaster and the Water District 1 Advisory Committee 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.

Other Provisions Necessary

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

b. Water Right Nos. 01-04024 and 01-04025

Priority Date

This right may be exercised if it is determined by the Secretary that additional water may be passed through Minidoka Dam, in excess of that authorized under right nos. 01-00217 and 01-00218, without the loss of water that could be stored in the reservoir system. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott.

This right carries no entitlement to make a delivery call for hydropower generation except as against junior hydropower rights.

Other Provisions Necessary

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

ii. PALISADES POWER RIGHTS

The State of Idaho's and the USBOR's August 17, 2009 motions for summary judgment also asserted that the following remarks should be substituted for the "historic practices hydropower remark" set forth in the Director's Recommendations for the Palisades power rights:

a. Water Right No. 01-02068

Priority Date

The United States, after consultation with the Watermaster and the Water District 1 Advisory Committee, may release stored water from Jackson Lake and Palisades reservoirs for the maintenance of power production at Palisades Dam powerplant and may store such water in American Falls Reservoir. The release of such water will be confined, however, 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 minimum firm power production 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.

Other Provisions Necessary

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

b. Water Right No. 01-04054

Priority Date

This right may be exercised if it is determined by the Secretary that additional water may be passed through Palisades Dam, in excess of that authorized under water right no. 01-02068, without the loss of water that could be stored in the reservoir system. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott.

Other Provisions Necessary

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

iii. SUPPORTING PARTIES

On November 3, 2009 the Aberdeen Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Magic Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and North Snake Ground Water District (collectively, "Ground Water Districts") joined in support of the State's motion for summary judgment.¹

On November 4, 2009 Fremont-Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, Blackfoot Irrigation Company, and the United Canal Company (collectively, "Upper Valley Water Users") joined in support of the

¹ See Ground Water Districts' Response to the State of Idaho's Motion for Partial Summary Judgment, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Nov. 3, 2010).

State's motion for summary judgment.²

iv. OBJECTING PARTIES

On November 3, 2009 the 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, Twin Falls Canal Company, and Idaho Power Company opposed the State's and the USBOR's motions for summary judgment.³

C. SPECIAL MASTER'S REPORT AND RECOMMENDATION

On March 25, 2010 the Special Master issued its order granting in full the State's and the USBOR's motions for partial summary judgment, recommending that the partial decrees for the Minidoka and Palisades power rights include the explanatory remarks proposed by the movants.⁴

D. CHALLENGE TO SPECIAL MASTER'S REPORT AND RECOMMENDATION

On August 12, 2010 the 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, "Power Interests") challenged the Special Master's March 25, 2010 report and recommendation.⁵

The Idaho Power Company did not join in the August 12 Notice of Challenge.

II. FACTUAL BACKGROUND

On June 17, 1902, Congress passed the National Reclamation Act to promote the

² See Upper Valley Water Users' Response to the State of Idaho's Motion for Partial Summary Judgment, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Nov. 4, 2010).

³ See Surface Water Coalition's and Idaho Power Company's Joint Memorandum in Opposition to State of Idaho's and United States' Motions for Summary Judgment, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Nov. 3, 2010).

⁴ See Order Granting Motions for Summary Judgment and Special Master Report and Partial Recommendation, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Mar. 25, 2010).

⁵ See Notice of Challenge, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Aug. 12, 2010).

irrigation of arid and semi-arid public lands in the western states.⁶ The act authorized the Secretary of the Interior to construct and maintain irrigation works for the storage, diversion, and development of waters for the reclamation of public lands and to withdraw from public entry the lands required for such irrigation works.⁷

In 1904, the Secretary approved the first reclamation project in Idaho—the Minidoka Project.⁸ The two initial units of the project consisted of a gravity division lying primarily on the north side of the Snake River and a pumping division on the south side of the river. Water was delivered to the units by way of canals that diverted water from the Snake River at the Minidoka Dam. Completed in 1906, the dam was primarily a diversion dam that raised the waters of the river up to the level of the diversion canals, while also providing electric power for the project.⁹

From the beginning, it was recognized that hydropower would be necessary for the pumping of irrigation water to the project lands lying above the level of the dam, chiefly in the south side pumping division.¹⁰ Accordingly, the dam was originally constructed with ten penstocks to facilitate the powerplants' need to generate irrigation pumping power during the irrigation season: the first three generating units were installed at the Minidoka Dam in 1909, the fourth and fifth units were installed in 1911, a sixth unit was installed in 1927, and a seventh unit was installed in 1942.

In the winter months when power was not needed for irrigation pumping, there was a large amount of surplus power available. Pursuant to the so-called “Town Sites and Power Development Act of 1906,” the Secretary was authorized to lease surplus power produced at reclamation projects, provided such leases did not “impair the efficiency of the irrigation

⁶ See Pub. L. No. 57-161, 32 Stat. 386 (1902).

⁷ See *id.*

⁸ See *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 532 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941).

⁹ See *id.*

¹⁰ See *id.*

project.”¹¹ Accordingly, with the approval of the Secretary of Interior, the predecessor of the USBOR leased surplus power from the Minidoka powerplants to the project residents and adjacent towns.

The Palisades Dam and Reservoir reclamation project was authorized in 1949.¹² Like the Minidoka Project, the Palisades Project was developed primarily to benefit irrigation, and in fact, it is operated in conjunction with the Minidoka Project reservoirs. The project was to consist of a 1.4 million acre-feet reservoir (1.2 million acre-feet of active storage) that would provide supplemental storage supplies to 650,000 acres of land in the upper Snake River basin as well as provide flood-control protections.¹³ In addition, the Palisades dam was also to include a 112,500-kW powerhouse, intended to supply power to the City of Idaho Falls and to the Minidoka north side pumping division and the Michaud Flats project.¹⁴

Before construction of the Palisades project could be completed, Congress required that assurances be made with the Snake River water users to secure the winter water supply necessary to fulfill the project’s purposes:

The continuation of construction of Palisades Dam beyond December 31, 1951, . . . is hereby made contingent on there being a finding by the Secretary . . . that contracts have been entered with various water users’ organizations of the Upper Snake River Valley in Idaho that, in his opinion, will provide for an average annual savings of one hundred and thirty-five thousand acre-feet of winter water.¹⁵

Ultimately, the USBOR obtained such assurances, and the Palisades dam was completed in 1957.

The mechanisms agreed upon to provide adequate winter water savings, included: (1) the

¹¹ Pub. L. No. 59-103, 34 Stat. 117, § 5 (1906).

¹² See Pub. L. No. 81-864, 64 Stat. 1083 (1949). The Palisades Project was originally authorized in 1941, however, funding and construction did not follow due to various obstructions that included the United States’ involvement in World War II and a lack of assurances regarding the water supply for the project. See H.R. Doc. No. 81-720 (2d Sess. 1950) (Supplemental Report at 2).

¹³ See H.R. Doc. No. 81-720 (2d Sess. 1950) (Supplemental Report at 4).

¹⁴ See H.R. Doc. No. 81-720 (2d Sess. 1950) (Supplemental Report at 4, 11).

¹⁵ Pub. L. No. 81-864, § 4, 64 Stat. 1083 (1949).

elimination of winter diversions for stock and domestic use; (2) the coordinated operation of the USBOR's reservoir system on the upper Snake River; and (3) the limitation of the use of water for power generation at the Minidoka Dam in order to conserve additional water for storage in American Falls, Island Park, and Palisades reservoirs. These winter water savings mechanisms were memorialized as standard provisions in approximately 57 spaceholder contracts, commonly referred to as the "Palisades contracts," entered into between the Secretary of the Interior and various upper Snake River irrigation entities. Thereafter, the irrigation entities stipulated to supplemental water right decrees in both the upper and lower Snake River reaches above Milner Dam, which incorporated various provisions of the Palisades contracts.¹⁶ Neither the State of Idaho nor the United States were parties to the supplemental adjudication.

In summary, the common thread throughout the creation and evolution of the Upper Snake River Reclamation reservoir system is the principle that the system is operated to optimize total storage in the reservoir system and that hydropower generation is incidental and subordinate to that objective.

III. ARGUMENT

The explanatory remarks set forth in the Special Master's report and recommendation are necessary for the definition, clarification, and administration of the Minidoka and Palisades hydropower water rights.¹⁷ Water District No. 1 is required to administer water rights in accordance with the prior appropriation doctrine,¹⁸ and acting pursuant to that authority, the water district has administered the Minidoka and Palisades hydropower water rights in the manner in which they were established and exercised, namely in such a way that hydropower

¹⁶ See Supplemental Decree, *Burley Irr. Dist. v. Eagle* (Idaho 5th Dist. Ct. July 10, 1968) & Supplemental Decree, *Aberdeen-Springfield Canal Co. v. Eagle* (Idaho 7th Dist. Ct. Mar. 12, 1969).

¹⁷ See Idaho Code § 42-1411(2)(j).

¹⁸ See Idaho Code § 42-602.

generation at reclamation projects is curtailed when necessary to effectuate the greatest practicable conservation of water in the reclamation project reservoirs.¹⁹ The issuance of partial decrees for these water rights without the limiting explanatory remarks would fail to recognize the manner in which these rights have been exercised within Water District No. 1 and would thereby fundamentally alter the operation of the Upper Snake River Basin.²⁰ For these reasons, the inclusion of the explanatory remarks set forth in the Special Master's report and recommendation is necessary for the administration, clarification, and definition of the Minidoka and Palisades power rights.²¹

Despite the Power Interests' 87 page tome setting forth alleged errors by the Special Master, the resolution of this case is quite simple. The USBOR as the sole claimant and owner of these hydropower water rights has the right to voluntarily limit these rights. While this case can be resolved based upon the USBOR's indisputable ownership of the rights, the State will nonetheless refute the myriad of other arguments the Power Interests have raised.²²

A. AS THE SOLE CLAIMANT AND OWNER OF THE MINIDOKA AND PALISADES HYDROPOWER WATER RIGHTS, THE UNITED STATES IS FREE TO VOLUNTARILY LIMIT ITS RIGHTS.

The USBOR is the sole claimant and owner of the hydropower water rights at issue in these proceedings. The Power Interests failed to file alternative claims to these rights and failed to object to the name element of the Directors' Recommendations in these subcases. Moreover, the Power Interests also failed to explain how their contentions can be reconciled with the holding in *Ickes* that the United States owns the Minidoka hydropower water rights and that the

¹⁹ See Supplemental Director's Report, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Apr. 10, 2008).

²⁰ See *id.* at 5–6.

²¹ See Idaho Code § 42-1411(2)(j).

²² The Power Interests' shotgun approach to this challenge requires a focused response. Thus, rather than attempting to address each argument raised by the Power Interests, the State has grouped the Power Interests' argument for purposes of response. The State expressly incorporates by reference its arguments set forth in prior briefing on each and every argument raised by the Power Interests.

authority over power production at Reclamation projects is vested solely in the Secretary.²³ As the sole claimant and owner of these hydropower water rights, the USOBOR is free to limit them as it sees fit.

i. THE POWER INTERESTS ASSERTION OF AN OWNERSHIP INTEREST IN THESE HYDROPOWER WATER RIGHTS IS BEYOND THE SCOPE OF THEIR OBJECTIONS.

Perhaps the most telling fact refuting the Power Interests' position regarding their controlling interests in these hydropower water rights is the Power Interests' failure to file alternative claims to these rights and failure to object to the name element of the Director's Recommendations in these subcases. Having failed to properly raise the issue of ownership in these subcases, the Power Interests should be held to the same standard that they proclaimed in the Basin 01 "high flow" subcases—i.e., objectors in the SRBA may not raise issues that are not properly set forth in their objections: "While the SRBA Court may have authority to review the Director's Report (including those portions not objected to), it does not follow that an Objector who fails to provide notice may raise every conceivable issue – regardless of the connection to the actual objections."²⁴

ii. THE USBOR OWNS THE MINIDOKA AND PALISADES HYDROPOWER WATER RIGHTS WITHOUT QUALIFICATION.

The Power Interests' failure to claim the hydropower water rights at Minidoka and Palisades in their own name is not surprising given the holding in *Burley Irr. Dist. v. Ickes* that the United States owns the Minidoka hydropower water rights. In *Ickes*, BID raised precisely the same ownership arguments that BID and its fellow Power Interests now raise in these proceedings: "STATEMENT OF POINTS . . . 4. [BID] is the beneficial and equitable owner

²³ *Ickes*, 116 F.2d at 531, 539.

²⁴ Joint Response to Ground User's Motion for Leave to File Amended Objections and Pocatello's Memorandum at 8, *In re SRBA Case No. 39576, Subcase Nos. 01-00004 et al.* (Idaho 5th Dist. Ct. Oct. 30, 2008).

of the water-rights decreed for power purposes at Minidoka Dam”²⁵ The Court of Appeals in that case squarely disagreed with BID’s assertions of ownership.

The *Ickes* court found that the United States, and not BID, owned “without qualification” the water rights at the Minidoka Dam:

[B]y adjudication of the state court of Idaho in 1913, and later of the United States District Court for the District of Idaho, priorities in the appropriations and rights to receive the waters of the Snake River were determined, and those applicable to lands within the project, including that for power at Minidoka Dam, were decreed to the United States. Thus the Government originally owned without qualification not only the works of the project, but the water right from the use of which [BID] asserts its claim here. That ownership continues unabated ²⁶

The United States remains the owner of the plant, the water right and the business, as it has from the beginning, because these properties have not been transferred to the districts, and the conditions upon which transfer might be made have either not been prescribed by Congress or not been fulfilled.²⁷

Beyond the conclusory statements set forth in the Power Interests’ briefings, there is nothing in the record showing that ownership of these water rights has ever been transferred to the Power Interests. To the contrary, as parties to the 1968 and 1969 Eagle Decrees, the Power Interests expressly incorporated and affirmed the Foster Decree’s determination that the United States was the sole and unqualified owner of the Minidoka power rights:²⁸

Right No. 9

That the defendant, the SECRETARY OF THE INTERIOR OF THE UNITED STATES, and his successors in office, is hereby awarded the use of the waters of the natural flow 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 Snake River below the Minidoka Dam after being used for

²⁵ Brief of Appellant at 16–17, *Burley Irr. Dist. v. Ickes*, No. 7522 (D.C. Cir. Dec. 8, 1939); see also *id.* at 19 (“[BID] is, therefore, the equitable owner of the water right”).

²⁶ *Ickes*, 116 F.2d at 531.

²⁷ *Ickes*, 116 F.2d at 539.

²⁸ See Supplemental Decree at 1, *Burley Irr. Dist. v. Eagle* (Idaho 5th Dist. Ct. July 10, 1968); Supplemental Decree at 2, *Aberdeen-Springfield Canal Co. v. Eagle* (Idaho 7th Dist. Ct. Mar. 12, 1969).

said power purposes, and hereby designated as Right No. 9.²⁹

The Power Interests repeatedly defend the Eagle Decrees as the final statement on all points regarding water rights in the Upper Snake River Basin, with apparently only one glaring exception—according to the Power Interests, the Eagle Decrees wrongfully named the United States as the sole and unqualified owner of the Minidoka power rights. The Power Interests as parties to the Eagle Decree are collaterally estopped from now arguing that they have an ownership interest in the Minidoka hydropower water rights.³⁰

iii. IDAHO LAW ALLOWS FOR VOLUNTARY SUBORDINATION OF WATER RIGHTS.

As the sole party on record in the SRBA with an ownership interest in these water rights, the USBOR is entitled to enter into agreements defining how its hydropower water rights will be decreed in the SRBA. The Idaho Supreme Court in *Idaho Power Company v. State*³¹ made this clear: “We hold only that a voluntary subordination agreement is not in violation of Idaho’s water law.”³² That is exactly what we have here. The USBOR has voluntarily moved for summary judgment to accept a limitation upon its hydropower water rights.³³

²⁹ Decree at 8, *Twin Falls Canal Co. v. Foster* (Idaho 4th Dist. Ct. June 13, 1913).

³⁰ See *Rodriguez v. Dept. of Corr.*, 136 Idaho 90, 93, 29 P.3d 401, 403 (July 11, 2001). The court in *Rodriguez* set forth the five factors for collateral estoppel to bar re-litigation of an issue decided in an earlier proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. See *id.* All of those factors are present in this case, barring the Power Interests from re-litigating the issue of ownership of the senior Minidoka power rights.

³¹ *Idaho Power Company v. State*, 104 Idaho 575, 661 P.2d 741 (1983).

³² *Id.* at 587, 661 P.2d at 753.

³³ The Power Interests argue that the State and the IDWR Director have exceeded their constitutional and statutory authorities by seeking limiting remarks on these water rights. See e.g., Surface Water Coalition’s Joint Opening Brief at 24, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010). That argument disregards both the law and the facts in these proceedings. First, the Court already decided in the Basin 01 Historic Practices subcase, no. 00-92026, that the Director and the State may seek limiting remarks on water rights pursuant to recognized legal doctrines such as waiver, estoppel, laches, forfeiture, abandonment, etc. See Order Deconsolidating Subcase 00-92026 and Order of Recommitment to Special Masters, *In re SRBA Case No. 39576, Subcase Nos. 00-92026*. (Idaho 5th Dist. Ct. July 1, 2008). Second, the State and the Director did not act alone in seeking the limiting remarks on these water rights; the USBOR, the sole claimant and owner of these water rights, moved for summary judgment in support of the remarks.

The Power Interests have failed to submit any evidence into the record that would support: (1) their claim of ownership of these water rights; (2) that they were granted the right to veto the USBOR's voluntary acceptance of the Special Master's recommended explanatory remarks, and/or (3) that they were granted any right to control how the water rights would be recognized under state law.³⁴ Instead, the Power Interests continue to assert a contractual right to certain power loss payments and a contractual right to an unspecified reserved power rate. Neither of those interests implicates injury to another water right nor do they implicate matters of water rights administration. Those interests are purely contractual. To the extent the Power Interests believe they have a contractual interest, such interest must be pursued in the United States Court of Federal Claims.

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The Power Interests' argument that Idaho Code § 42-203B does not allow the USBOR to subordinate its power rights is untimely and without merit. *See* Surface Water Coalition's Joint Opening Brief at 82, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010). First, the Power Interests failed to raise any issues pursuant to Idaho Code § 42-203B below, and therefore, the arguments related thereto are untimely and not properly before the court on this challenge. Second, Idaho Code § 42-203B(3) explicitly authorizes subordination when there is no agreement. Third, Idaho Code § 42-203B(6) simply authorizes the IDWR Director to subordinate power rights granted in a permit or license; it does not address or limit the water right claimant's authority, or the court's authority, to subordinate power rights in a partial decree. Fourth, the ratification requirement of 42-203B(5) applies only to 42-203B(2) subordination agreements, which are a very narrow class of subordination agreements. The ratification requirement 42-203B(5) has no application to any other type of subordination agreement.

The Power Interests' argument that the USBOR's voluntary agreement to include the explanatory remarks in these water rights would constitute a transfer of use pursuant to Idaho Code § 42-222 is also untimely and without merit. *See* Surface Water Coalition's Joint Opening Brief at 46, 81, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010). The Power Interests failed to raise any issues pursuant to Idaho Code § 42-222 below, and therefore, the arguments related thereto are untimely and not properly before the court on this challenge. Moreover, neither the summary judgment motions nor the Special Master's report and recommendation addressed the purpose of use element for these water rights.

The Power Interests also argue that the USBOR's voluntary agreement to include the explanatory remarks in these water rights constitutes a constitutional taking on the part of the State. *See* Surface Water Coalition's Joint Opening Brief at 31, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010). The Power Interests have failed to allege the necessary elements of a taking—e.g., the Power Interests have not alleged that the government is taking the property for public use—and thus, the Power Interests have failed to prove an unconstitutional taking in this case. *See United Investors Life Ins. Co. v. Severson*, 143 Idaho 628, 634, 151 P.3d 824, 830 (2007).

³⁴ To the extent that the Power Interests claim an ownership interest in these power rights based simply on the fact that the Power Interests are consumers of such power, the Power Interests have failed to show how their interests would be superior to the interests of the other consumers in these proceedings. In other words, what would give the Power Interests a right to veto the USBOR's voluntary agreement over the objection of the other consumers in this litigation, namely the State, the Ground Water Districts, and the Upper Valley Water Users?

B. THE POWER INTERESTS' ATTEMPT TO MAKE SUBORDINATION OF THESE WATER RIGHTS CONTINGENT UPON CONTINUED POWER LOSS PAYMENTS IS CONTRARY TO LONG-STANDING RECLAMATION LAW AND *BURLEY IRRIGATION DISTRICT V. ICKES*.

The State and the USBOR moved to include explanatory remarks in the USBOR's Minidoka and Palisades hydropower water rights to recognize the historic relationship between hydropower generation and storage in the Upper Snake River reclamation storage system. In response, the Power Interests go to great lengths to suggest that the State and the USBOR are attempting to change how the projects were historically operated. Specifically, the Power Interests assert that subordination of these hydropower water rights occurred no sooner than, and only because of, the Palisades Contracts. The Special Master correctly disagreed with the Power Interests, finding instead that long-standing Reclamation law and case law dictated that power generation at the Minidoka and Palisades facilities is incidental to storage in the reservoir system.³⁵

i. HYDROPOWER GENERATION AT RECLAMATION PROJECTS, SUCH AS THE MINIDOKA AND PALISADES PROJECTS, WAS SUBORDINATED AS A MATTER OF RECLAMATION LAW LONG BEFORE THE PALISADES CONTRACTS EXISTED.

In their Opening Brief, the Power Interests' reiterate their argument that there can be no curtailment of the Minidoka and Palisades hydropower water rights without the continued exchange of the power loss payments provided for in the Palisades Contracts. The Power Interests ignore, however, the long-established Reclamation law to the contrary. In 1940, the Court of Appeals for the D.C. Circuit held in *Burley Irr. Dist. v. Ickes*³⁶ that power generation at Reclamation projects is to be incidental and subordinate to storage in the reservoir system as a matter of Reclamation law. In other words, the status quo has long been that power generation at

³⁵ See Order Granting Motions for Summary Judgment and Special Master Report and Partial Recommendation, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* at 12–13 (Idaho 5th Dist. Ct. Mar. 25, 2010).

³⁶ *Ickes*, 116 F.2d at 532.

the Minidoka and Palisades projects shall be curtailed for the benefit of storage in the reservoir system, regardless of the power loss payment system provided for in the Palisades Contracts.

In *Ickes*, Burley Irrigation District (BID) brought an action against the United States, arguing that BID owned a right to a portion of the profits produced at the Minidoka Dam power plant and that the United States had exceeded its authority when it determined that it was in the best interests of the Minidoka Project to store the winter flows of the Snake River rather than sending the water past Minidoka for power production. As the *Ickes* court recounted, the federal powerplant at the Minidoka Dam was constructed to provide electricity to power the pumps used to lift water to Minidoka Reclamation Project lands. Since electricity for these pumps was only required during the irrigation season, the federal government saw an opportunity to generate power during the non-irrigation season as well. This power, which was excess to the needs of the project, was marketed to project residents and neighboring towns for commercial purposes. Federal Reclamation law, however, expressly provided that the production of this excess power was not to interfere with the primary irrigation purpose of the Minidoka Reclamation Project:

Whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said reclamation law, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the moneys derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided, That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project.*³⁷

BID challenged this limitation, because a percentage of the profits from the sale of commercial power was credited to the Reclamation accounts of the Minidoka and Burley irrigation districts. As such, it was in the interest of those districts to have a maximum flow of water through the Minidoka powerplant during the non-irrigation season for generating surplus

³⁷ Town Sites and Power Development Act of 1906, Pub. L. No. 59-103, 34 Stat. 116 (1906) (emphasis added).

commercial power. In the 1930s, however, the United States entered into an agreement with the Idaho Power Company that involved the cessation of winter power operations at the Minidoka Dam and the storage of the winter flow in upstream reservoirs for summer irrigation use.³⁸ In response, BID sued Secretary of the Interior Ickes over this arrangement, arguing that the United States “ha[d] no right or authority to withhold, without notice, hearing or compensation, the water decreed for power purposes at Minidoka Dam.”³⁹

In response, the United States in *Ickes* asserted its duty under the Reclamation Acts to conserve water for irrigation purposes to the detriment of commercial hydropower production:

[W]ith the duty on him under the Reclamation Act to give preference in the use of water to irrigation needs of projects rather than to the production of power for sale, the course of action to be taken by the Secretary was not obscure. *The winter operation of the Minidoka Power Plant must be curtailed to the utilization of only the amount of water which must in any event be released to meet rights lower down on the stream.*⁴⁰

The United States argued that it would be wasteful to do otherwise: “We suggest that the use of water for power purposes which the Secretary has curtailed was likewise wasteful of irrigation water.”⁴¹

The court in *Ickes* agreed with the United States, finding that the primary objective of the Reclamation Acts under which the Minidoka Reclamation Project was created was irrigation of arid lands, not power production:

The primary object of the statute, and of the project, is the reclamation of arid lands through irrigation. The production of power for pumping in connection with irrigation is an important incident to this main object. Disposition of surplus power, not required for pumping or other uses of irrigation, for commercial uses is authorized by an amendatory act of April 16, 1906 *But the development and sale of such power is authorized only as an incidental phase of reclamation, not as a primary or independent end in itself. The statute and its amendments are*

³⁸ *Ickes*, 116 F.2d at 536.

³⁹ Brief for Appellant at 17, *Burley Irr. Dist. v. Ickes* (D.C. Cir. Dec. 8, 1939).

⁴⁰ Brief for Appellee at 42–43, *Burley Irr. Dist. v. Ickes* (D.C. Cir. Jan. 25, 1940) (emphasis added).

⁴¹ *Id.* at 83 n.18.

reclamation acts, not commercial power acts. The legislation is entirely inconsistent with the development and sale of commercial power whenever that may interfere with the development of irrigation or “impair the efficiency of the irrigation project.”⁴²

The court went on to find that hydropower production at Reclamation Act facilities was entirely incidental to irrigation storage:

*It would seem that the statute’s clear mandate would subordinate the commercial uses of power to those of irrigation in any case where the two uses might be in conflict, and therefore, whatever might be the case with an appropriation of water for power purposes unqualified by conditions attached by federal law, the Secretary, quite apart from considerations regarding preservation of the power business, was following out the statutory command.*⁴³

The court’s findings in *Ickes* cannot be denied. Power production at the Minidoka Dam “that may interfere with the development of irrigation or ‘impair the efficiency of the irrigation project,’”⁴⁴ is precluded as a matter of Reclamation law. Thus, regardless of any contractual right the Power Interests claim to have to compensation for curtailment of power generation to enhance water storage, such rights cannot override federal Reclamation law. The court in *Ickes* made this abundantly clear, and the United States’ reservoir operations documents confirm this is how the system is operated.⁴⁵

The Power Interests are trying to change the status quo. They are seeking to make the United States’ statutory obligation to serve the primary purposes of the Reclamation projects contingent upon continued power loss payments. They assert that if the power loss payments go away, the incidental nature of the power generation at the Minidoka Dam, as set forth in *Ickes*,

⁴² *Ickes*, 116 F.2d at 530–31 (emphasis added).

⁴³ *Ickes*, 116 F.2d at 541 n.15 (emphasis added); see also *id.* at 535 (“Water passing in winter serves only to generate power at the plant for commercial sale, is useless for irrigation and pumping, and is lost therefore to the project, including Burley District, for its primary purposes. Winter flow is therefore highly wasteful.”).

⁴⁴ *Ickes*, 116 F.2d at 530–31.

⁴⁵ See e.g., *The Upper Snake River Basin: A Description of Bureau of Reclamation System Operations Above Milner Dam* 32–34 (Jan. 1996) (“Power generation is secondary or incidental to flood control and irrigation water supply at Federal dams and no water is released from Reclamation facilities specifically for power generation except for water held under spaceholder contracts (IPC is the only electric utility that has a spaceholder contract and that contract amount is 44,275 acre-feet in American Falls Reservoir).”).

goes away as well. Their arguments are foreclosed by federal Reclamation law and the *Ickes* decision.

ii. THE EXPLANATORY REMARKS EXPRESSLY PROTECT THE POWER INTERESTS' CONTRACTUAL RIGHTS TO THE POWER LOSS PAYMENTS.

The explanatory remarks set forth in the Special Master's report and recommendation do nothing to infringe upon any contractual rights the Power Interests claim to have to the power loss payments under the Palisades contracts. Despite the Power Interests' hollow claims to the contrary,⁴⁶ the remarks propounded by the State and the USBOR—and recommended by the Special Master—could not be clearer on this point:

Other Provisions Necessary

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

Accordingly, any claim the Power Interests' may have under the Palisades contracts, including any contractual claim to continued power loss payments, will survive these SRBA proceedings. To the extent the Power Interests feel aggrieved by the effect of USBOR operations of the Minidoka and Palisades projects on their power loss payments, they are and will continue to be free to pursue any remedies available to them under the Palisades contracts.⁴⁷

iii. AN EXPLANATORY REMARK DICTATING CONTINUED POWER LOSS PAYMENTS IS BEYOND THE SCOPE OF WATER RIGHTS ADMINISTRATION AND IS NOT NECESSARY FOR THE ADMINISTRATION, CLARIFICATION, OR DEFINITION OF THESE WATER RIGHTS.

The explanatory remarks set forth in the Special Master's report and recommendation accurately describe those portions of the language of the Palisades contracts that are necessary

⁴⁶ See Surface Water Coalition's Joint Opening Brief at 73, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010).

⁴⁷ See Order Granting Motions for Summary Judgment and Special Master Report and Partial Recommendation at 12, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Mar. 25, 2010) ("Any claim of non-compliance under the Contracts is a matter for the Court of Federal Claims.").

for the definition, clarification, and/or administration of these rights.⁴⁸ Water right decrees and contracts serve different purposes: A water right decree describes the nature and extent of the owner's right to the use of water from a particular water system, whereas a contract memorializes an agreed-upon exchange of promises and consideration between two or more parties. Not all of the commitments in the Palisades contracts relate to administration. The Power Interests' insistence that the decrees include a remark that requires continued power loss payments demonstrates this distinction.

Here, the Power Interests assert that the continued exchange of power loss payments must be recognized in these water rights. Yet, the Power Interests have not, and can not, show that such a remark is relevant to water rights administration. As discussed above, subordination of the Minidoka and Palisades power rights is a matter of Reclamation law and is not contingent upon the contractual power loss payment exchange system. Regardless of the relationship between subordination and power loss payments, the regulation of such payments is beyond the scope of water rights administration.⁴⁹ Would the Power Interests require the watermaster to calculate power loss figures? Would the Power Interests require the watermaster to account for each and every power loss payment in order for the watermaster to determine whether subordination is in order? Would the Power Interests require the watermaster to enforce payment in the event of a default? Will IDWR now be in the business of adjudicating federal Reclamation contract disputes between private entities over electric power rates?

These questions remain unanswered because the Power Interests are attempting to change water administration in the Upper Snake River basin into something entirely new. Tony Olenichak, Program Manager and Deputy Watermaster, Water District No. 1, confirmed in his

⁴⁸ See Idaho Code § 42-1411(2)(j).

⁴⁹ See Idaho Code § 42-1411(2)(j).

deposition that the district has never considered the power loss figures in its administration of water rights and that the district does not find it necessary to do so in the future:

A. I've never been concerned with the power loss calculation in the administration of the water rights.⁵⁰

Q. Does Water District 1 review the power loss calculation of the Bureau?

A. I never have reviewed it.⁵¹

Q. Does the water district calculate power loss figures?

A. No.

Q. Does the accounting program account for or include any reference to the power loss calculations?

A. No.

Q. Has anyone in Water District No. 1 ever requested the water district to make those calculations or include them in the accounting system?

A. Not to my knowledge.

Q. Is it necessary for the administration of the Minidoka power rights to include a power loss reference?

A. No, I don't think so.⁵²

It is neither appropriate nor necessary to include the power loss provision of the Palisades contracts in the partial decrees for these water rights. Rather, all that is necessary for inclusion in the decrees is that which was recommended by the Special Master.

C. THE POWER INTERESTS WRONGFULLY ASSERT THAT THE TWO SENIOR MINIDOKA WATER RIGHTS ARE SUBORDINATED ONLY TO IRRIGATION STORAGE RATHER THAN TO THE OPTIMIZATION OF TOTAL STORAGE IN THE RESERVOIR SYSTEM.

The explanatory remarks set forth in the Special Master's report and recommendation are necessary for the definition, clarification, and/or administration of these rights in order to recognize the principle that the Upper Snake River reservoir system is operated to optimize total storage in the reservoir system and that hydropower generation occurs only incidental and subordinate to that objective. The Power Interests aim particular ire towards the language in the

⁵⁰ Deposition of Anthony Olenichak at 88–89, *In re SRBA Case No. 39576, Subcase no. 01-00217 et al.* (Idaho 5th Dist. Ct. Sept. 16, 2009).

⁵¹ *Id.* at 91.

⁵² *Id.* at 153–54.

explanatory remarks for the two senior Minidoka power rights, nos. 01-00217 and 01-00218, that recognizes that the power rights have been subordinated not only to irrigation storage but to total storage in the reservoir system. The Power Interests ignore, however, the fact that in neither the development of the USBOR's water rights, nor the water district's administration of the water rights, has either entity ever differentiated among the various storage purposes of the reservoir system.

- i. **THE USBOR DEVELOPED THESE WATER RIGHTS UNDER THE PRINCIPLE THAT THE RESERVOIR SYSTEM IS OPERATED TO OPTIMIZE TOTAL STORAGE IN THE SYSTEM WITHOUT DIFFERENTIATING AMONG THE VARIOUS STORAGE PURPOSES.**

In spite of how the Power Interests would prefer that the USBOR operate the reservoir system and the Minidoka power plant, the USBOR made it clear during its Rule 30(b)(6) deposition that the USBOR developed these water rights with the intent of operating the system to optimize total storage, without distinguishing among the various storage purposes:

- Q. And we had a discussion a little while ago about the language in paragraph 24(a) that references loss of water for irrigation?
- A. Uh-huh.
- Q. And that term "irrigation" is not included in this proposed remark; correct?
- A. Correct.
- Q. Okay. And the basis for not including that phrase or that term "irrigation" is because from your perspective Reclamation stores all the water without regard to whether it's through contract for irrigation as opposed to hydropower or for other project purposes?
- A. That's correct.⁵³
- Q. 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 of storage of water for specific purpose?
- A. We've considered it to be storage, period.
- Q. Okay.
- A. We have not tried to separate out the purposes, if you will.⁵⁴

⁵³ 30(b)(6) Deposition of the Bureau of Reclamation, Testimony of Richard M. Rigby at 80, *In re SRBA Case No. 39576, Subcase no. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 27, 2009).

In its summary judgment briefings, the USBOR set forth a compelling case for why the Power Interests' proposed operational changes are so troublesome.⁵⁵ First, it may not be possible to implement the proposed changes because the quantity of non-irrigation water is considerably small relevant to the total system capacity. Second, even if it is possible, the proposed changes would increase the risk of a storage shortfall, which would affect both irrigation and non-irrigation storage uses. Regardless of these reservations, one thing is certain: the USBOR operates the Minidoka power plant with the understanding that its hydropower water rights are subordinate not only to irrigation storage but to the optimization of total storage in the reservoir system.

ii. SUBORDINATION OF THE TWO SENIOR MINIDOKA HYDROPOWER WATER RIGHTS TO ALL STORAGE IS CONSISTENT WITH HISTORIC EXERCISE OF THESE WATER RIGHTS.

The record shows that the explanatory remarks in the Special Master's report and recommendation are consistent with past exercise of these rights. Tony Olenichak testified as follows:

Paragraph 4. [R]emarks are consistent with Water District No. 1's historical administration of the Minidoka power rights.⁵⁶

Q. [I]s it your testimony that if the right were administered in accordance with this remark, then there would be no change from the historical administration of those two rights?

A. If this remark had been in place, we still would have administered to the power right the same as we had in the past.⁵⁷

Q. [W]ith respect to these remarks in paragraph 4, from your perspective, are these

⁵⁴ 30(b)(6) Deposition of the Bureau of Reclamation, Testimony of Richard M. Rigby at 127–28, *In re SRBA Case No. 39576, Subcase no. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 27, 2009).

⁵⁵ Reply Brief in Support of the United States' Motion for Summary Judgment at 6–7, *In re SRBA Case No. 39576, Subcase no. 01-00217 et al.* (Idaho 5th Dist. Ct. Nov. 10, 2009).

⁵⁶ Affidavit of Anthony Olenichak at 2, *In re SRBA Case No. 39576, Subcase no. 01-00217 et al.* (Idaho 5th Dist. Ct. Aug. 18, 2009).

⁵⁷ Deposition of Anthony Olenichak at 80, *In re SRBA Case No. 39576, Subcase no. 01-00217 et al.* (Idaho 5th Dist. Ct. Sept. 16, 2009).

- remarks necessary to aid in the administration of these rights?
- A. Yes.⁵⁸

The explanatory remarks set forth in the Special Master's report and recommendation accurately describe how the water rights were established, how the reservoir system has been operated, and how the water rights have been administered by the watermaster. The Power Interests' attempt to change that status quo through the inclusion of the "irrigation" qualifier should therefore be denied.

D. IT IS NOT NECESSARY TO INCORPORATE THE ENTIRETY OF THE EAGLE DECREES IN ORDER TO RESOLVE THE OBJECTIONS AND RESPONSES TO THE "HISTORIC PRACTICES HYDROPOWER REMARK" AND THE "WINTER POWER OPERATION REMARK".

The explanatory remarks set forth in the Special Master's report and recommendation accurately describe how the water rights have been exercised and how the water rights have been administered by the watermaster. The remarks incorporate all the principles in the Palisades contracts that are necessary for the definition, clarification, and/or administration of the rights.⁵⁹ The Power Interests' assertion that each and every word of the Eagle Decrees must be incorporated into these water rights is untimely and unnecessary for administration.

i. THE POWER INTERESTS ASSERTION THAT THE ENTIRETY OF THE EAGLE DECREES MUST BE INCLUDED IN THE PARTIAL DECREES FOR THESE WATER RIGHTS IS BEYOND THE SCOPE OF THEIR OBJECTIONS.

As is the case with the Power Interests' claim of ownership to these power rights, the issue of whether the SRBA Court should incorporate the entirety of Eagle Decrees into these water rights is also not properly before the court. A review of the Power Interests' objections shows that at no time did any of those parties assert, imply, or suggest that the SRBA Court should incorporate the entirety of the Eagle Decrees. Yet, the Power Interests now assert an

⁵⁸ Deposition of Anthony Olenichak at 85, *In re SRBA Case No. 39576, Subcase no. 01-00217 et al.* (Idaho 5th Dist. Ct. Sept. 16, 2009).

⁵⁹ See Idaho Code § 42-1411(2)(j).

entitlement to have the court rule on that issue in these proceeding, even though no proper objections or timely motions for summary judgment have been filed. Again, the court should hold the Power Interests to their own standard of what can be argued in the SRBA—i.e., objectors in the SRBA may not raise issues that are not properly set forth in their objections: “While the SRBA Court may have authority to review the Director’s Report (including those portions not objected to), it does not follow that an Objector who fails to provide notice may raise every conceivable issue – regardless of the connection to the actual objections.”⁶⁰

ii. IT IS NOT NECESSARY FOR ADMINISTRATION TO INCLUDE EVERYTHING IN THE EAGLE DECREES.

The entirety of the Eagle Decrees is immaterial to administration of these water rights in general and immaterial to the relationship between these water rights and Reclamation storage in particular. Attaching all 148 pages of the decrees to these water rights runs afoul of the very purpose of the SRBA.⁶¹ Idaho Code § 42-1411(2)(j) requires explanatory remarks to include only that information that is “necessary” for the definition, clarification, or administration of the water right. Certainly, all 148 pages of the Eagle Decrees are not necessary for administration of the six hydropower rights at issue here. Certainly, all 38 pages of the Palisades contract exhibits to the Eagle Decrees are not necessary for administration. Water District No. 1 apparently agrees with this conclusion:

Q. And the Eagle Decrees, you are familiar with them?

A. Yes.

⁶⁰ Joint Response to Ground User’s Motion for Leave to File Amended Objections and Pocatello’s Memorandum at 8, *In re SRBA Case No. 39576, Subcase Nos. 01-00004 et al.* (Idaho 5th Dist. Ct. Oct. 30, 2008).

⁶¹ The Eagle Decrees are comprised of two decrees, both of which are of sizable length: the *Burley Irrigation District v. Eagle* decree is 58 pages long, and the *Aberdeen-Springfield Canal Company. v. Eagle* is 90 pages long. The assertion that the water right decrees at issue in these subcases must now total 148-plus pages long is simply impractical. Tellingly, the Power Interests have failed to insist that their irrigation water rights also incorporate the 148 pages of the Eagle Decrees. Apparently, the principle of “what’s good for the goose is good for the gander” does not apply to the Power Interests’ water rights.

- Q. Now, are all portions and remarks set forth in those Eagle Decrees necessary for the administration of the Minidoka power rights?
- A. No, I don't think so.⁶²

The Power Interests have failed to prove the necessity of including the Eagle Decrees. Instead, the Power Interests simply make broad assertions regarding the Decrees' applicability, without explaining or providing factual support for why each of the provisions is actually necessary for administration. Such conclusory assertions are insufficient to defeat summary judgment.⁶³

iii. THIRD-PARTY INTERESTS ARE NOT PREJUDICED BY THE REMARKS RECOMMENDED BY THE SPECIAL MASTER.

The Power Interests also argue that the Special Master's explanatory remarks for the two senior Minidoka power rights are fatally flawed because the remarks fail to carryover those references in the Palisades Contracts to the USBOR's obligation not to interfere with certain "third-party rights" downstream of the Minidoka Dam. They argue that the North Side Canal Company, Twin Falls Canal Company, and Idaho Power Company were apparently the beneficiaries of this language and that their downstream rights, if any, may not be recognized absent a statement in the Minidoka Power Rights.

This argument is without merit. The North Side Canal Company, Twin Falls Canal Company, and Idaho Power Company's downstream water rights, if any, must stand or fall on their own merits. It is not necessary to address those rights in these water rights, especially since none of the allegedly affected rights have been litigated to partial decree. If in fact they have such rights, priority will control their relationship to the Minidoka and Palisades power rights.

The Power Interests go to great lengths in their Opening Brief defending the necessity of

⁶² Deposition of Anthony Olenichak at 153, *In re SRBA Case No. 39576, Subcase no. 01-00217 et al.* (Idaho 5th Dist. Ct. Sept. 16, 2009) (objection omitted); *see also supra* Section III.B.iii (discussing the water district's lack of involvement with the administration of the power loss payment provision of the Palisades contracts).

⁶³ *See NW Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002) ("The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue.").

including a remark in these waters that references Idaho Power's claimed downstream rights. Yet, Idaho Power chose not to challenge the Special Master's recommendation in these subcases. The power company apparently was satisfied with the State and the USBOR's repeated insistence that the exclusion of such reference in the Special Master's explanatory remarks would not prejudice the power company from pursuing its claims to any such water through its own water right subcases. The Special Master's recommendation resolved an important aspect of these water rights, and it did so without adversely affecting any alleged "third-party rights" of the Power Interests.

E. THE EAGLE DECREES ARE NOT BINDING ON THE STATE BECAUSE THE STATE WAS NOT A PARTY THERETO AND THE ADJUDICATIONS WERE NOT GENERAL STREAM ADJUDICATIONS.

The Power Interests argue that the court must reverse the Special Master's report and recommendation because the relief granted therein is inconsistent with the language of the Eagle Decrees, which the Power Interests assert are binding on the State for two reasons. First, the Power Interests claim that the State was a party to the Decrees, and as such, it is bound thereto. Second, the Power Interests claim that the Eagle Decrees proceedings were general stream adjudications, and as such are binding on all water users, stating that the Eagle Decrees were the result of a "*de jure* and *de facto* general adjudication, that joined as parties all persons diverting water from the Snake River above the Milner Dam."⁶⁴ There is no good faith basis in law for the Power Interests' argument.

The only evidence the Power Interests offer in support of their assertion that the State is bound by the Decrees was the joinder of the watermaster. Yet, the Power Interests ignore the fact that the watermaster was actually a USGS engineer with limited appointed powers at the

⁶⁴ Surface Water Coalition's Joint Opening Brief at 55, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010).

time of the Eagle Decrees.⁶⁵ The Director of the Department of Water Resources could only delegate, and did only delegate, to the watermaster the authority to administer water rights in accordance with the provisions of title 43, chapter 6, Idaho Code.⁶⁶ As such, the watermaster could only act within the scope of that authority. Nothing in chapter 6 authorizes the watermaster to appear on behalf of the State or to otherwise bind the State in its sovereign capacity. Since the State of Idaho never appeared in its sovereign capacity, it is not bound by the Decrees.

The Snake River Basin Adjudication is a general adjudication under the terms of the McCarran Amendment, and the United States is a named defendant in the SRBA, along with all other water right holders in the Snake River Basin including the State of Idaho. In contrast, the Eagle proceedings are most decidedly not a McCarran Amendment general stream adjudication. The Idaho Supreme Court has held that in order for an adjudication to be a McCarran Amendment general adjudication in Idaho “all claimants on the Snake River and all of its tributaries within the state of Idaho must be included in the adjudication.”⁶⁷ The Court based its conclusion in part on the committee report accompanying the McCarran Amendment, which states,

*by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceeding. . . . Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.*⁶⁸

⁶⁵ See Affidavit of Lyle Swank at 2, *In re SRBA Case No. 39576, Subcase no. 01-00217 et al.* (Idaho 5th Dist. Ct. Nov. 10, 2009).

⁶⁶ See Certificate of Appointment (Mar. 28, 1969).

⁶⁷ *In re Snake River Basin Water System*, 115 Idaho 1, 8, 764 P.2d 78, 85 (1988).

⁶⁸ *Id.* at 7, 84.

The Eagle Decrees most decidedly did not include all water rights in the Snake River Basin. Rather, the Eagle Decrees are the result of a private water adjudication and “bin[d] only those parties to the decree[s]. Section 42-1401A of the Idaho Code clearly provides that a [p]rivate adjudication . . . binds only those persons joined in the action and for the administration of such rights.”⁶⁹ According to the Court in *State v. Hagerman Water Right Owners, Inc.*:

Insomuch as this Court has acknowledged that water rights in the Snake River basin are interrelated . . . the Director’s factual findings as to one water right holder impact the rights of other water right holders. To hold that the Director is “obligated to accept prior decrees as being conclusive proof of the nature of a water right” is contrary to the Director’s statutory role in the SRBA and such a holding would have the effect of binding water right owners not parties in a prior adjudication to a prior decree issued in a private adjudication. This is an untenable outcome.⁷⁰

The untenable outcome described by the Court in *Hagerman* is precisely the result the Power Interests seek in this challenge.

The Power Interests rely heavily on the holding of *Mays v. District Court of Sixth Judicial District*⁷¹ in support of their claim that the Eagle Decree proceedings were intended to be general stream adjudications: “[I]t is clear that the method used to adjudicate water rights is less important than the right to do so 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.”⁷² As the Idaho Supreme Court pointed out in *Hagerman*, however, the Court in *Mays* was interpreting a statute providing for summary supplemental adjudication of water rights (C.S. § 7036) that was repealed in 1981:

Respondent Canal Companies argues that, although by statute, “the director’s report filed in this matter constitutes ‘prima facie evidence of the nature and

⁶⁹ *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997) (internal quotations and citations omitted).

⁷⁰ *Id.* (citations omitted).

⁷¹ *Mays v. District Court of Sixth Judicial District*, 34 Idaho 200, 200 P. 115 (1921).

⁷² Surface Water Coalition’s Joint Opening Brief at 61–62, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010).

extent of the water rights acquired,'... Respondent Canal Companies cite to *Mays v. District Court of Sixth Judicial Dist.*, 34 Idaho 200, 200 P. 115 (1921), for this proposition, not to language in the current statutory scheme. In that case, the Court was interpreting C.S. § 7036 providing for summary supplemental adjudication of water rights That language was repealed in 1981 and does not appear in the current statutory scheme. Act of April 7, 1981, ch. 265, § 3, 1981 Idaho Sess. Laws 561.⁷³

Therefore, the Power Interests' reliance on *Mays* is misplaced and should be disregarded.

Furthermore, the Idaho Supreme Court has already stated that Idaho statutory law does not obligate the Director to accept a prior decree as conclusive proof of the nature and extent of a water right. "Although a decree evidences a legal right to the use of water,"⁷⁴ it does not obligate the Director to make a recommendation contrary to his findings."⁷⁵ The Court further stated:

Nowhere in Title 42 is the Director "obligated to accept a prior decree" issued in a private adjudication "as being conclusive proof of the nature of a water right." This is especially true in light of longstanding decisions in Idaho that decreed water rights, although protected like any other water right, are not insulated from re-examination by the court and may be lost or reduced based on evidence that the water right has been forfeited, *Graham v. Leek*, 65 Idaho 279, 287-88, 144 P.2d 475, 479 (1943), abandoned, *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59-60, 231 P. 418, 421-22 (1924), *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 393, 43 P.2d 943, 947 (1935), or lost through adverse possession.⁷⁶

Since the Eagle Decrees were not the result of a general stream adjudication, the State of Idaho is not bound by the Eagle Decrees, nor is the Director constrained by the Decrees in making his recommendation. Rather, the Director "looks at these individual decrees as part of the whole, and these decrees are subject to review and not fully sufficient among themselves."⁷⁷ The Power Interests' argument that the Eagle Decrees should be considered by this court as general stream adjudication decrees whose effect are binding on all other water users in the SRBA is simply

⁷³ *State v. Hagerman*, 130 Idaho at 741 n.3, 947 P.2d at 414.

⁷⁴ See Idaho Code § 42-230(e).

⁷⁵ *Id.* at 741, 947 P.2d at 414.

⁷⁶ *Id.* (emphasis added).

⁷⁷ Rule 30(B)(6) Deposition of the State of Idaho, Testimony of David R. Tuthill, Jr. at 33, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 22, 2009).

untenable and inconsistent with Idaho law, and the law of this case.

F. SUMMARY JUDGMENT IS NOT PRECLUDED JUST BECAUSE THE STATE, THE USBOR, AND IDWR AGREED TO REMARK LANGUAGE THAT DIFFERS FROM THE REMARK LANGUAGE USED IN THE ORIGINAL DIRECTOR'S REPORT.

The Power Interests suggest that summary judgment is precluded in this subcase simply because the remark language proposed by the State and the USBOR differs from the remark language in the Director's Report. They imply that IDWR must submit an amended director's report to the court pursuant to Idaho Code § 42-1411 before the court can rule on the motions.⁷⁸ This argument lacks support in law or reason.

There is nothing in Idaho Code 42 § 1411 or of other provisions of the code that requires IDWR to submit a second recommendation to the court. IDWR submitted the Director's Reports for these USBOR water rights on December 19, 2006. Objections to the original historic practices subordination conditions in the Director's Reports were filed by the USBOR and the Power Interests. As is normal SRBA procedures, the Parties and IDWR started discussing settlement proposals. In fact, the Parties and IDWR participated in two mandatory settlement conferences, moderated by Special Master Bilyeu. In the settlement discussions, the USBOR provided the State and IDWR with information about the hydropower rights at Minidoka dam and how the USBOR historically reduced the flow of water for power in favor of optimizing total storage in the reservoir system. As a result of the settlement discussions, the USBOR and the State agreed to support new remark language that more precisely reflects how the USBOR has exercised these hydropower water rights. Since these remarks simply clarify the remark recommended by the Director, no purpose would be served by requiring a second director's report.

⁷⁸ See Surface Water Coalition's Joint Opening Brief at 55, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010).

Indeed, the fact that the Power Interests have had an opportunity to depose the Director responsible for the original remark refutes the need for remanding the matter for a second director's report. As David R. Tuthill, former Director of IDWR, discussed in his deposition:

[W]e have become aware of the fact that there has been a systematic approach by the Bureau of Reclamation to optimize the hydropower use relative to storage water [W]e have become aware that there has been a limitation on the hydropower use through optimizing storage in the system.⁷⁹

Former Director Tuthill further stated:

I was aware of the discussions that were taking place, and approved of the use of the new remark as a replacement to the previous remark. . . . [The new language] is before the SRBA court. There's an opportunity for input, in my understanding. There's an opportunity for various perspective [sic] on this. In my capacity as director, I was aware of the process and found the new reflection to be better than the initial reflection. And the adequacy of this new reflection is subject to review by the Court. . . . I think a more explicit description of the extent of subordination is appropriate on a hydropower right.⁸⁰

What this testimony shows is that former Director Tuthill considered the information from the settlement discussions and found the new language more precisely described how the USBOR has exercised these power rights.

It is not uncommon in the SRBA for IDWR to consider information gained after the issuance of the Director's Report and to agree to changes because of the new information. Contrary to the Power Interests' protestations, however, the fact that IDWR supports the new remark language does not give rise to a requirement that it submit an amended director's report to the court. Idaho Code § 42-1411 simply does not require a new Director's Report when new language is presented to the Director that more precisely reflects how the water right was developed and exercised.

⁷⁹ Rule 30(B)(6) Deposition of the State of Idaho, Testimony of David R. Tuthill, Jr. at 108, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 22, 2009).

⁸⁰ Rule 30(B)(6) Deposition of the State of Idaho, Testimony of David R. Tuthill, Jr. at 77, 80–81, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 22, 2009).

Most telling, the Power Interests' argument is directly contrary to the position taken by its members in their objections in these subcases. In the two senior Minidoka power right subcases, nos. 01-00217 and 01-00218, Power Interests members took the position that the Department lacks the authority to submit a second director's report, stating instead:

[T]he Director has already issued his Recommendation for this water right in the Basin 01 Part 1 Report and he has no authority to unilaterally change that Recommendation by a subsequent report.⁸¹

The Power Interests apparently were for the alleged "mockery of the statutory procedures and specific duties"⁸² before they were against it.

Finally, the lack of a second director's report does not prejudice the Power Interests. As former Director Tuthill pointed out, the Power Interests are able to raise their concerns regarding the proposed remark language to the court in this proceeding. The fact that they have submitted an 87-page brief that raises a plethora of alleged errs refutes their contention. Since the Power Interests have had a full opportunity to depose the Director and representatives of the State and the USBOR and raise their concerns about the proposed remark language in this proceeding, having IDWR file a new director's report in this case would only serve to delay resolution of this issues raised in the motion for summary judgment. There is no reason to take a step backward.

G. THE STATE'S RELIANCE ON THE TESTIMONY OF THE FORMER AND CURRENT DIRECTOR OF IDWR DOES NOT VIOLATE IDAHO CODE § 42-1401B.

The Power Interests suggest that because the State identified the former and current interim IDWR Directors as deponents when the Power Interests sought a deposition pursuant to

⁸¹ Objections, Burley Irrigation District at 2, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 & 01-00218*. (Idaho 5th Dist. Ct. Apr. 19, 2007); Objections, Minidoka Irrigation District at 3, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 & 01-00218* (Idaho 5th Dist. Ct. Apr. 19, 2007); *see also* Objection, Twin Falls Canal Company & North Side Canal Company at 2–3, *In re SRBA Case No. 39576, Subcase Nos. 01-00211A*. (Idaho 5th Dist. Ct. Apr. 19, 2007) (using the same language set forth in the BID and MID objections in these subcases).

⁸² Surface Water Coalition's Joint Opening Brief at 55, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010).

I.R.C.P. 30(b)(6), the State violated Idaho Code § 42-1401B.⁸³ This argument lacks support in law and logic.

By the plain language of Idaho Code § 42-1401B, the Attorney General may appear in the SRBA and represent the interests of the State of Idaho. Also, by the plain language of the statute, the Director of IDWR may not be a party to the adjudication. However, simply because the former and current director of IDWR provides testimony related to this case does not mean that IDWR is being made a party to the adjudication. Nor does the fact that IDWR cannot be a party to the adjudication mean that the current and former director cannot testify for the State of Idaho about the facts of this case and important state policies.

What the Power Interests fail to recognize is that the State of Idaho speaks through designated representatives. The Idaho Legislature has expressly directed that the Director of IDWR “shall have direction and control of the distribution of water from all natural water sources within a water district”⁸⁴ Thus, as testified to by former Director Tuthill, he is the appropriate deponent because he has first hand knowledge of the facts of this case.⁸⁵ The fact that the Legislature has directed that IDWR is not a party to the adjudication does not override the Director’s other statutory duties. The mere fact that the Director is providing testimony related to his other duties does not make him a party in the SRBA.

⁸³ Surface Water Coalition’s Joint Opening Brief at 53–55, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010)

⁸⁴ Idaho Code § 42-602.

⁸⁵ See Rule 30(B)(6) Deposition of the State of Idaho, Testimony of David R. Tuthill, Jr. at 10–11, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 22, 2009). The State has the same right as any party to the SRBA to call the IDWR Director.

H. THIS COURT SHOULD DECREE THE TWO JUNIOR MINIDOKA POWER RIGHTS REMARKS AS RECOMMENDED BY THE SPECIAL MASTER IN SUBCASE NOS. 01-04024 AND 01-04025 BECAUSE THE POWER INTERESTS HAVE FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT.

Summary judgment should be entered in subcase nos. 01-04024 and 01-04025 where the Power Interests have failed to raise a genuine issue of material fact in opposition to the Special Master's recommendation on those issues. The Power Interests' opposition in these proceedings relies entirely on the Eagle Decrees and the Palisades Contracts. However, neither the Eagle Decrees nor the Palisades Contracts address the two junior beneficial use rights at the Minidoka Dam. That being so, the Power Interests have failed to raise a genuine issue of fact, or legal opposition, as to why the USBOR, as the sole claimant and owner of these beneficial use water rights, cannot agree to limit those rights.⁸⁶

I. THIS COURT SHOULD DECREE THE PALISADES POWER RIGHTS REMARKS AS RECOMMENDED BY THE SPECIAL MASTER IN SUBCASE NOS. 01-02068 AND 01-04054 BECAUSE THE POWER INTERESTS HAVE FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT.

The Special Master's recommendation granting summary judgment in subcase nos. 01-02068 and 01-04054 was correct because the Power Interests failed to raise a genuine issue of material fact in opposition to the proposed remarks. The Power Interests' briefs are almost entirely silent on the proposed Palisades remarks. The Power Interests make only incidental mention of the remarks in their briefs in reference to their request that the entirety of the Eagle Decrees be attached to the SRBA decrees for these water rights. Yet, the Power Interests have provided no argument rebutting the Special Master's determination that the recommended explanatory remarks are necessary for the definition, clarification, and/or administration of the Palisades power rights. The Power

⁸⁶ See *NW Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002) ("The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue.").

Interests entire argument in these proceedings is targeted at the two senior Minidoka power rights, not the Palisades rights. The Power Interests have therefore failed to raise any genuine issue of material fact in opposition to the Special Master's recommendation in the Palisades power right subcases.

J. THE POWER INTERESTS ARE COLLATERALLY ESTOPPED FROM ARGUING AGAINST THE PRINCIPLE THAT THE SYSTEM IS OPERATED TO OPTIMIZE TOTAL STORAGE IN THE RESERVOIR SYSTEM AND THAT HYDROPOWER GENERATION IS ENTIRELY INCIDENTAL AND SUBORDINATE TO THAT OBJECTIVE.

In 1990, members of the Power Interests took a position in *Upper Snake River Chapter of Trout Unlimited v. Hodel*⁸⁷ that is directly contrary to their present position in these subcases. In *Hodel*, certain environmental organizations sought to enjoin the Secretary of the Interior from reducing the flows from Palisades Dam below 2,000 cfs in order to protect the downstream trout fishery. Members of the Power Interests intervened, asserting that the USBOR had the authority and duty to reduce the flows below Palisades as far as is necessary to maximize upstream storage. In fact, those members of the Power Interests argued for the same "fill and spill" operation that they now find objectionable.⁸⁸ In their appeal brief in *Hodel*, the Power Interests members argued that assuring project storage comes first and foremost: "The Bureau must store water to the greatest extent possible prior to April 1 of each year because a large run-off cannot be anticipated. . . . In fact, because of the spaceholder contracts, the agency is under a mandatory duty to store water in the greatest amounts possible."⁸⁹ Noticeably absent from the discussion in the Power Interests members' Brief of Intervenor-Appellees was any mention that power generation is an exception to the Bureau duty to optimize storage in the Reclamation reservoirs.

⁸⁷ *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232 (9th Cir. 1990).

⁸⁸ Surface Water Coalition's Joint Opening Brief at 46-47, *In re SRBA Case No. 39576, Subcase Nos. 01-00217 et al.* (Idaho 5th Dist. Ct. Oct. 7, 2010) ("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.'") (citations omitted).

⁸⁹ Brief of Intervenor-Appellees at 18, 25, *Upper Snake River Chapter of Trout Unlimited v. Hodel* (July 20, 1989).

There can be no dispute that the Power Interests members intended storage be held back not only at Palisades, but throughout all Minidoka Project reservoirs, in times of shortage. In their appeal brief, the Power Interests members argued:

[A]ny action at any one of the dams in the project must be coordinated with similar actions at other project facilities, keeping in mind the overall objective of storing water upstream whenever possible to avoid the loss of any water past the Milner diversion point, which is the last point in the system where water can be diverted and used on Minidoka Project lands.⁹⁰

The Power Interests members continued on to praise the USBOR for its decision to hold back water—i.e., water that could otherwise be producing power—during the low water years of 1988 and 1989 in favor of storage:

When the Court carefully reviews the intricate operations undertaken by the Bureau of Reclamation in managing the Minidoka Project, the interrelationship of the various dams and reservoirs on that system, together with the impact of State law based water rights and the contractual obligations of the Bureau of Reclamation, it should be readily apparent that BOR undertook the only action prudent and permitted under the circumstances, namely, to reduce flows to an amount resulting in the greatest possible storage [T]he agency has merely operated its Minidoka Project reservoir system consistent with past precedent, congressional authorization, and the circumstances existing at the time.⁹¹

Again, noticeably absent from this discussion in the Power Interests members' Brief of Intervenor-Appellees is any mention of power generation at Palisades or Minidoka as being an exception to the duty to optimize storage.

Ten years later, those same Power Interests members now argue that power generation takes priority over storage. They assert that water would be spilling past Minidoka and Palisades Dams for power generation, but for: (i) continued payment of power loss compensation; (ii) the existence of the Palisades Contracts; (iii) and the existence of the Eagle Decrees. Thus, the Power Interests argue that power production at these Reclamation Act facilities is superior to

⁹⁰ *Id.* at 17.

⁹¹ *Id.* at 29–30.

storage, but for these concessions.

The State sees it differently. The State agrees with the argument the Power Interests members made before the Ninth Circuit Court of Appeals in *Hodel*: “the overall objective [is] storing water upstream whenever possible to avoid the loss of any water past the Milner diversion point.”⁹² Power generation is incidental and subordinate to that objective.

Since the Power Interests have previously advocated in other litigation a position consistent with the explanatory remarks at issue in these subcases, the Power Interests are estopped from opposing the Special Master’s report and recommendation.⁹³

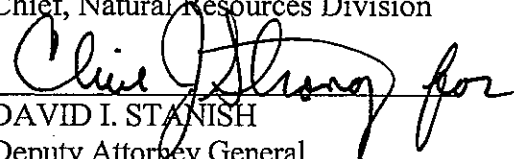
IV. CONCLUSION

The Special Master’s recommended explanatory remarks accurately represent the historic development and administration of the Minidoka and Palisades water rights for generation of hydroelectric power. Because the proposed remarks are necessary for administration of water rights within Water District No. 1, the Special Master correctly granted summary judgment resolving all objections and responses to the “historic practices hydropower remark” and the “winter power operation remark.”

RESPECTFULLY SUBMITTED this 26th day of October 2010.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division


DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

⁹² *Id.* at 17.

⁹³ See *Rodriguez v. Dept. of Corr.*, 136 Idaho 90, 93, 29 P.3d 401, 403 (July 11, 2001).

I certify that on this 28th day of October 2010, I caused to be served the original and copies of the **STATE OF IDAHO'S RESPONSE BRIEF** on the following persons by the methods indicated:

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Represented by:
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MAGIC VALLEY GWD
NORTH SNAKE GWD
Represented by:

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CANDICE MCHUGH
101 CAPITOL BLVD., STE. 208
BOISE, ID 83702

CITY OF POCA TELLO
Represented by:
JOSEPHINE P BEEMAN
409 W JEFFERSON ST
BOISE, ID 83702

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A&B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
FALLS IRRIGATION DISTRICT
Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396

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MILNER IRRIGATION DIST
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY
Represented by:
JOHN SIMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485

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MINIDOKA IRRIGATION DISTRICT
Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318

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NEW SWEDEN IRRIGATION DISTICT
FREMONT-MADISON IRR DIST
Represented by:
JERRY R. RIGBY
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250

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Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

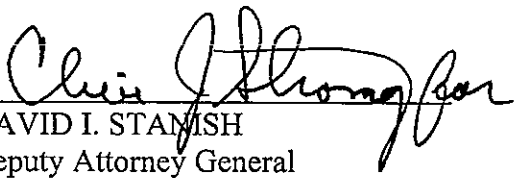
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UNITED STATES OF AMERICA
REGIONAL DIRECTOR PN REGION
BUREAU OF RECLAMATION PN-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

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IDWR DOCUMENT DEPOSITORY
PO BOX 83720
BOISE, ID 83720-0098

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DAVID I. STAMISH
Deputy Attorney General