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Counsel for the United States**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

)

Subcase No.: See Attachment A

)

Case No. 39576

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**THE UNITED STATES RESPONSE
TO THE SWC'S OPENING BRIEF
ON CHALLENGE**

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Introduction

Special Master Dolan's ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

("ORDER GRANTING") recommended that this Court adopt a set of remarks for the United States'

hydropower water rights at Minidoka and Palisades Reservoirs that repeat provisions of the

Palisades Contracts, slightly modified to add clarity and make the remarks consistent with

Reclamation's historic operation of the rights. Though the Surface Water Coalition's ("SWC")

OPENING BRIEF ON CHALLENGE ("SWC BRF.") is both long and vehement, the SWC does not

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dispute that remarks, addressing the United States' operation of Minidoka and Palisades Reservoirs and their respective powerplants, are appropriate. Nor does it dispute that the remarks should be premised on the Palisades Contracts, which have guided operation of the Palisades and Minidoka hydropower rights for more than half a century. In fact, the SWC urges this Court to adopt a remark referencing the Eagle Decrees, the only relevant parts of which merely repeat the Palisades Contracts.

The SWC's infatuation with the Eagle Decrees stems from a desire to protect the contractual "power loss" interests of three irrigation districts. An irony of the SWC's argument is that the modifications it urges would likely lead to Reclamation storing less water, to the detriment of *all* irrigation contractors. That may explain why the State and all the irrigation contractors, save for the SWC, support the remarks adopted by Special Master Dolan. Regardless, this Court need not get ensnared in the complexities of the power loss provisions – which span seven pages of the Palisades Contracts – because those contract provisions serve very different purposes than a water right and therefore need not be incorporated into the decrees. Moreover, the contracts are still in force and still bind the United States. The Eagle Decrees, however, do not. The United States was not a party to the Eagle Decrees, and could not have been because the proceedings failed to meet the requirements for waiving the United States' sovereign immunity imposed by the McCarran Amendment. Consequently, this Court cannot accept the Coalition's invitation to bind the United States to the Eagle Decree through a remark.

Despite the length of its brief, the SWC seeks only three particular additions to the remarks recommended by Special Master Dolan. Below, the United States demonstrates those proposed additions are neither necessary nor warranted. In any event, given the limited and

discrete nature of the dispute between the parties there should be no question that summary judgment is the appropriate means of resolving this matter. Nonetheless, the SWC insists summary judgment is inappropriate. Its argument fails because it misunderstands both the role of a court sitting as fact-finder and the evidence in the record. In any event, there is no question that even if this Court should agree with the SWC that the remarks improperly omit aspects of the Palisades Contracts' provisions, the Court can reform the remarks accordingly. In short, there is no reason this matter cannot be resolved on summary judgment.

Factual Background

At issue in this proceeding are the remarks for six hydropower water rights owned by the United States and used for hydropower generation at power plants located at Minidoka and Palisades Reservoirs.^{1/} The remarks recommended by Special Master Dolan are founded on, and consistent with, contracts between the United States and the many parties using water from Palisades Reservoir.

^{1/} Four of the water rights are used at the Mindoka powerplant. Two of those rights, 01-217 and 01-218 (the senior Minidoka hydropower rights) were decreed in *Twin Falls Canal Co v Foster*, (4th Jud. Dist., Twin Falls Co., June 20, 1913) ("the Foster Decree"). The other two, 01-4024 and 01-4025 (the junior Minidoka power rights) were established by beneficial use in 1927 and 1942 respectively. The junior Minidoka rights are of little practical consequence. As Mr. Rigby explained in his deposition, they are only in effect during times of surplus water, *i.e.*, at times there is "ample water to fill the reservoirs and extra water to release downstream." Deposition Testimony of Richard M. Rigby ("Rigby Depo.") at 108:10 (Oct. 27, 2009) (pertinent pages attached as Exhibit C to the Second Affidavit of David A. Jarvis (Nov. 10, 2009) ("2nd Jarvis Aff.")). The other two water rights are used at the Palisades powerplant. The senior Palisades right, 01-2068, was licensed with a priority of 1939. The junior Palisades right, 01-4054, was established through beneficial use. Its 1958 priority post-dates the Palisades Contracts.

Those contracts, referred to as the Palisades Contracts, are the product of a process that began with the Secretary's authorization of Palisades Reservoir in 1941. Palisades was authorized as a multiple-purpose project to provide water for supplemental irrigation supply, flood control and hydroelectric power generation.^{2/} H.R. Doc. 77-457 (1941) at iii. One major obstacle, however, had to be overcome in order for Palisades Reservoir to be constructed: the irrigators' practice of running water through their canals throughout the winter for domestic and stock purposes deprived the reservoir system of more than four hundred thousand acre-feet of potentially storable water, leaving an inadequate water supply for the reservoir.^{3/} See H. R. Doc. 81-720 at vii.

Congress refused to provide appropriations for the construction of Palisades reservoir until an adequate supply of water could be assured. See Act of September 30, 1950, Pub. L. No. 864, 64 Stat. 1083 (1950) at § 4. Moreover, Congress required that assurance be provided through contracts "with various water users' organizations of the Upper Snake River Valley in Idaho." *Id.* Extensive negotiations between Reclamation officials and water users resulted in an agreement to make water available for storage in Palisades by conserving water in the winter through three means: (1) the water users would cease winter diversions; (2) operation

^{2/} The onset of World War II and water supply issues delayed the construction of the reservoir. In 1950, Congress re-authorized the reservoir, in a slightly modified form, for the same purposes. See Act of September 30, 1950, Pub. L. No. 81-864, 64 Stat. 1083 (1950) at § 1; see also H. R. Doc. 81-720 (1950) at iv (attached as Exhibits C & D to the Affidavit of David I. Stanish (Aug. 17, 2009) ("Stanish Aff.")).

^{3/} Of the more than 400,000 total acre-feet of potentially storable water, 135,000 was above Palisades Reservoir. See Pub. L. No. 81-864, at § 4.

of the upper Snake River federal reservoirs would be coordinated to maximize storage water yields; and (3) the United States would curtail power generation at Minidoka Dam to conserve additional water for storage in American Falls, Island Park, and Palisades reservoirs. U.S. Bureau of Reclamation, Status Report-Workings of Palisades Water Savings Agreement (1968) at 2-3 (“Status Report”) (attached as Exhibit A to the Affidavit of David Jarvis (Aug. 17, 2009) (“Jarvis Aff.”)). Reclamation estimated that those conservation efforts would yield as much as 593,000 acre-feet annually during prolonged cycles of drought, such as that experienced from 1930 to 1935. *Id.* at 6. As Congress required, that agreement was embodied in contracts with water users, including many of the parties to these proceedings.

Reclamation’s agreement with the water users addressed a number of other issues unrelated to the operation of the Minidoka and Palisades power plants. *See id.* at 2-3. As a result, the Palisades Contracts include a raft of provisions with no relevance here. The Contracts do, however, include standard provisions which explain how the Secretary of Interior will exercise the United States’ hydropower water rights at Palisades and Minidoka Reservoirs. The Palisades Contracts were confirmed in judicial proceedings commonly referred to as the Eagle Decrees.⁴⁷ Notwithstanding the SWC’s emphasis on the Eagle Decrees, the essential issue before this Court is whether the remarks for water rights 01-217 and 01-218 must be a word-for-word recitation of the relevant portions of the Palisades Contracts.

⁴⁷ *Burley Irrigation Dist. v. Eagle* (Idaho 5th Jud. Dist., July 10, 1968) and *Aberdeen-Springfield Canal Co. v. Eagle* (Idaho 7th Jud. Dist., March 12, 1969). The Eagle Decrees are attached as Exhibits E & F to the Stanish Affidavit.

The remarks ruled on by Special Master Dolan were the product of extensive negotiations. Eventually all the parties to these subcases, with the exception of the SWC and Idaho Power, agreed to remarks proposed by the State and the United States that largely mirror the applicable provisions of the Palisades Contracts. Special Master Dolan correctly recognized that those remarks “did not amend the Palisades Contracts, but [instead] clarified historical operations and conformed to present realities by removing obsolete terms.”^{5/} ORDER DENYING at 2. Further he found that the Eagle Decrees neither created a “common plan,” nor bound the United States. *Id.* at 1-2. Thus he rejected the SWC’s contention that the remarks should simply incorporate the Eagle Decrees and instead recommended the proposed remarks.

I. STANDARD OF REVIEW.

As this Court recently explained, the applicable standard of review requires the Court to adopt Special Master Dolan’s finding of fact unless they are clearly erroneous. MEMORANDUM DECISION AND ORDER ON CHALLENGE, Subcase No. 63-32533 at 3 (April 21, 2010). Findings of fact are not clearly erroneous when they are supported by “substantial and competent evidence.” *Id.* at 3-4 (*quoting Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919,922 (1994)). The SWC carries the burden of showing error, and this Court must review the evidence in the light most favorable to the prevailing parties. *Id.*

Although Special Master Dolan’s conclusions of law are expected to be persuasive, they are not binding upon this Court. Consequently, this Court has “free review” over

^{5/} One of the “obsolete terms” relates to a contract interest claimed by Idaho Power. *See infra*, n. 11. Special Master Dolan’s ORDER DENYING JOINT MOTION TO ALTER OR AMEND (“ORDER DENYING”) specifically addressed Idaho Power’s concern. *See* ORDER DENYING at 5. It appears the Order resolved the matter because the company did not file a challenge.

the Master's conclusions of law and may uphold the conclusions only to the extent they correctly state the law. *Id.*

Finally, as a reviewing court, this Court may affirm Special Master Dolan's decision on grounds other than those relied on by the Master. Indeed, a reviewing court "must uphold the finding and judgment of the [lower] court if it is capable of being upheld on any theory." *Mortensen v. Stewart Title Guaranty Co.*, 149 Idaho 437, ___, 235 P.3d 387, 396 (2010) (quoting *Fischer v. Fischer*, 92 Idaho 379, 382, 443 P.2d 463, 466 (1968)).

II. THE REMARKS RECOMMENDED BY SPECIAL MASTER DOLAN SHOULD BE AFFIRMED.

The SWC would have this Court believe that the few words of deviation between the remarks recommended by Special Master Dolan and the wording of the Palisades Contracts create a "new," "broad" subordination that would fundamentally reset reservoir operations all parties agree have worked well for decades, to the detriment of three irrigation districts that have a contractual interest in hydropower generation at Minidoka dam. As is shown below, the proposed remarks will do no such thing. Indeed, an irony of the SWC's brief is that the operational paradigm implicit in its argument would bring a change to the operational *status quo*, to the potential detriment of its own members.

Cutting through the chaff of the SWC's argument, there are only three changes from the contract language the SWC even alleges to have consequence.⁹ All three apply only to

⁹ Apart from its specific complaints, the SWC offers a blanket challenge to the United States' ability to subordinate the senior Minidoka power rights at all. According to the SWC, the rights cannot be subordinated either because they were decreed in the Foster Decree without a subordination, or because they pre-date the 1928 Amendment to Idaho's Constitution. SWC Brf. at 23-24. Both contentions are without merit.

First, despite the SWC's repeated assertions that *the Director* is without authority to

the senior Minidoka rights, 01-217 and 01-218:⁷¹ (1) the proposed remarks speak of the Secretary's obligation to preserve "storage" rather than "storage for irrigation," SWC Brf. at 27; (2) the proposed remarks do not incorporate the power loss provisions of the Palisades Contracts, *Id.*; and (3) the proposed remarks delete the reference in the Palisades contracts to two downstream diversion rights once held by canal companies and a former contractual obligation to Idaho Power. *Id.* at 41-42.

subordinate a water right that was not subordinated by a prior decree, *e.g.*, SWC Brf. at 24, there is no question that Reclamation, the water right holder, can voluntarily subordinate its water rights. *Idaho Power Company v. State of Idaho*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) ("a voluntary subordination agreement is not in violation of Idaho's water law"). Further, it is simply illogical to suggest that a water right originally decreed without a subordination – as virtually all water rights are – could not later be subordinated. If the SWC were correct, both the 1934 Contract with Idaho Power and the Palisades Contracts would be voidable. *See* SWC Brf. at 25-27.

Second, SWC's suggestion that subordination was illegal prior to the 1928 amendment to Idaho's constitution simply illustrates that the SWC does not understand what a subordination is. A subordination is not a denial of the right to appropriate; rather it's a reflection of the fact that a water right is a property right which can be used – or not used – as the owner decides. *See Idaho Power*, 104 Idaho at 587 ("we find nothing in the laws of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property"). Moreover, in affirming a water right holder's ability to subordinate, the Idaho Supreme Court rejected an argument relying on the same constitutional provision the SWC relies on (*Id.* Const. Art. 15, § 3). *Id.*

⁷¹ The SWC has essentially nothing to say about the remarks for any of the water rights other than the two senior Minidoka rights (01-217 and 01-218). The SWC does not challenge the wording of the remarks for the two Palisades water rights (01-4054 and 01-2068) beyond making a blanket assertion that summary judgment is not appropriate for any of the junior water rights. SWC Brf. at 84. In the absence of a dispute over the terms of the remarks for the Palisades water rights, there is no reason for this Court not to affirm the Special Master's entry of Summary Judgment. The SWC argues that there is nothing in the record providing support for the subordination of the two junior Minidoka rights (01-4024 and 01-4025), but as was noted above, it is well settled that a water right holder can voluntarily subordinate its water rights.

A. The Remarks Recommended by Special Master Dolan Are Consistent With How the Powerplants Have Been Operated for Decades.

The Coalition's claim that the proposed remarks create a broad new subordination rests on the deletion of a single phrase – “for irrigation” – from the contracts.⁸ That deletion is far from the earth shattering change the SWC portrays it as. Indeed, Mr. Rigby offered uncontroverted testimony that Reclamation has long attempted to maximize storage of water without regard to that water's ultimate use – exactly as it would continue to do under the remarks. Rigby Depo., 2nd Jarvis Aff., Ex. C, at 127:23-128:7; 80:12-18. Despite the SWC's vehement opposition to having the word “irrigation” removed to make the remarks consistent with Reclamation's operations, it concedes the reservoirs “have been legally operated and administered in accordance with the contract provisions” for decades. SWC Brf. at 78. There is a simple reason why Reclamation's operations have worked for all: maximizing storage maximizes the water supply for all users, including the irrigation users. The supply of water is too uncertain to knowingly forego storage of any water available to Reclamation. Indeed, to do so, as the Coalition implies Reclamation must, would only increase the risk of water shortages.

B. Operating as the SWC Suggests Would Change the *Status Quo* to the Likely Detriment of Its Members.

What is most striking about the SWC's arguments is that they suggest the Coalition is more concerned about the power-loss payments that it asserts benefit three irrigation districts, than the Project water supply used by more than thirty contractors – including the other members of the SWC. Implicit in the SWC's fretting about the omission of the word “irrigation”

⁸ Despite the emphasis on irrigation, the remarks are of no consequence during the irrigation season because senior downstream irrigation water rights pull water through the powerplants. Rigby Depo., 2nd Jarvis Aff., Ex. C, at 108:10.

is the notion that Reclamation should operate the reservoirs in a three-tiered hierarchy: first, water would be stored for irrigation purposes; second, the senior Minidoka hydropower rights would be run at their full 2,700 cfs capacity for as long as possible; third, water would be stored for non-irrigation purposes – if any water is available.

The Court should understand three things about that proposition. First, implementing it would be a change from the *status quo* that the Coalition admits has worked for decades. *See* Rigby Depo., 2nd Jarvis Aff., Ex. C, at 127:23-128:7; 80:12-18. Second, it is not even certain Reclamation could implement the SWC’s proposal because the quantity of non-irrigation water is so small relevant to the total system capacity (about 1%) and the reservoir gates are relatively course instruments.^{9/} Third, even if Reclamation were able to finely parse out the non-irrigation water and the quantity of non-irrigation water were to increase, the most significant consequence of the SWC’s proposal would be a greater risk of a storage shortfall.^{10/}

^{9/} Idaho Power’s contract for roughly 45,000 acre-feet of storage is the only non-irrigation contract. The system’s total storage capacity, over 4,000,000 acre-feet, is almost one hundred times as much. Further, while the SWC frets that the omission of “irrigation” in the remarks open the door to Reclamation storing water “*for any purpose whatsoever*,” that is not the case. SWC Brf. at 45 (emphasis in original). The fact remains that Reclamation is statutorily limited in the purposes for which it can store water. *See id.* (listing purposes).

^{10/} The entire basis for the SWC’s allegation of injury to the three irrigation districts benefitting from power loss payments is that the remark will allow additional non-irrigation water to be stored and potentially lead to higher electric rates for those districts. *E.g.*, SWC Brf. at 33. While the United States does not believe that there will be a large scale transference of water from irrigation to hydropower use (the only other authorized purpose of any of the Minidoka or Palisades Project reservoirs can provide water for), even if a hydropower entity were to propose transferring water from irrigation to hydropower use, the SWC would have an opportunity to assert its alleged interests in a change proceeding. *See* I.C. § 42-222.

By seeking to maximize total reservoir storage, Reclamation maximizes storage *for the irrigation contractors.*^{11/} Indeed, if Reclamation were to do anything other than try to maximize storage, it would put irrigation storage at risk. The need to release water early in the water year for flood control purposes, variations in weather and the limited ability to forecast the weather all work to create risks of shortage. Putting hydropower generation ahead of non-irrigation storage would only increase the risk that Reclamation's storage right will be out of priority before Reclamation could store the non-irrigation water. That creates risk for junior irrigation users because any shortage would be apportioned to reservoir spaceholders according to the contracts and storage priorities – not by the purpose of use. In sum, operating the system to maximize total storage has not only been the *status quo* for decades; it also benefits all the contractors.^{12/}

^{11/} Maximizing storage does not mean that the system is operated to “fill and spill.” *Cf.* SWC Brf. at 46-47. Jackson and Palisades Reservoirs are operated for flood control. A “fill and spill” approach is incompatible with Reclamation's flood control obligations. Indeed, the entire point of flood control is to release water over the winter to empty enough space in the reservoir so that the reservoir can accommodate the spring runoff.

^{12/} The SWC's efforts to push non-irrigation water to the back of the storage line effectively targets Idaho Power's contractual right to 45,000 acre-feet of water, the only non-irrigation water in the system. While the SWC would have this Court make Idaho Power's water subordinate, Idaho Power is entitled to a proportionate share of the stored water just as all the other Spaceholders are. *See* Idaho Power Spaceholder Contract, Art. 21(b) (2nd Jarvis Afff., Ex. D). As the SWC notes, there is ongoing litigation between the United States and Idaho Power regarding the extent of the company's contract rights at American Falls Reservoir. That litigation address the “secondary storage” provisions of a 1923 Contract. While the United States asserts those provisions are no longer operative, no party, including the United States, disputes that Idaho Power retains a contractual right to a proportionate share of about 45,000 acre-feet of the water stored in the reservoir.

C. There is No Reason to Reference the Power Loss Payment Provisions of the Palisades Contracts.

The second issue identified by the SWC is the absence of a reference to the contractual power loss provisions in the proposed remarks.^{13/} Special Master Dolan rejected the SWC's argument that the remarks must reference the power loss provisions for two good reasons. First, he recognized that it is well established that the United States' generation of hydropower is an incidental function of a Reclamation Project. ORDER GRANTING at 12; *see also Burley Irrigation District v. Ickes*, 116 F.2d 529, 530-31 (D.C. Cir. 1940) (the production of power on the Minidoka Project for pumping in connection with irrigation is "an important incident" to the main objects of the Project). The SWC does not even address this point.^{14/}

Second, Special Master Dolan properly recognized that the power loss provisions

^{13/} The Court does not need a detailed understanding of the power loss provisions, but a few points of background may be helpful. The provisions, which apply only to the two senior Minidoka hydropower rights, are a product of the desire to store additional water during the non-irrigation season that was one of the drivers behind the Palisades contracts. Limiting the exercise of the early priority hydropower rights at Minidoka dam for power production increased the quantity of water that could be stored, to the benefit of the many parties holding space in the reservoirs, but at a cost to power production, and hence power revenues, at the dam. The power loss provisions created a mechanism by which "all contractors having reservoir rights benefitting from the water savings" would pay for the lost power. Aberdeen-Springfield Contract, Jarvis Aff., Ex. B, at ¶ 24(c). As the SWC concedes, the payments do not go to the three districts. Instead, they are treated as a revenue that offsets a portion of the costs associated with operating the powerplant. *See id.* at ¶ 24(e).

^{14/} The arguments the SWC does make only reiterate that the power loss provisions were properly excluded. As the SWC explains, power privileges such as those held by the three districts are statutorily prohibited from impairing the efficiency of a Reclamation project. SWC Brf. at 80 (citing 43 U.S.C. § 522). A consequence of that is that the power loss provisions are a product of how the reservoir is operated, not a driver of its operation. Accordingly, referencing them will not aid in the administration of the Minidoka hydropower water rights.

are a contract interest, not an element of a water right.¹⁵ *Id.* The SWC argues that the remarks must include the “specific consideration” underlying the Palisades Contracts (*i.e.*, the power loss provisions) because the “Eagle Decree affirmed the Palisades Contracts in total” and therefore the contract’s power loss provisions are “part and parcel” of the exercise of the water right.¹⁶ SWC Brf. at 28.

The SWC cites no precedent where the consideration underlying an agreement to forebear operation of a water right has been included in a water rights decree, much less any precedent that would require this Court to do so. Apart from that, Special Master Dolan identified a number of good reasons the remarks should *not* refer to the contractual provisions. First, a claim that Reclamation has violated the power loss provisions is a matter for the Court of

¹⁵ Nonetheless, the United States fully acknowledges its contractual obligation. The remarks recommended by Special Master Dolan include an express provision that makes it clear the decree does not disturb *any* of the United States’ contractual obligations.

¹⁶ In addition, the SWC criticizes Special Master Dolan for disregarding its members’ asserted “beneficial interest” in the power water rights. *See* SWC Brf. at 32. That criticism rings hollow because neither the members of the SWC, nor their constituents, have a beneficial interest in the hydropower water rights. First, the D.C. Circuit rejected the argument the SWC now raises in *Burley Irrigation District v. Ickes*, 116 F.2d 529 (D.C. 1940). Second, even if the SWC was not precluded from re-litigating the issue, its claim has no merit. The very case the SWC relies on demonstrates that a user of power has no claim to the water right. In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the Idaho Supreme Court held that “the entity that applies *the water* to beneficial use has a right that is more than a contractual right.” SWC Brf. at 32 (quoting *Pioneer*, 157 P.3d at 609) (emphasis added). Here, it is undisputed that Reclamation is the entity that applies the water to beneficial use. *Cf.* SWC Brf. at 32 (arguing “that Reclamation does not beneficially use *the power* generated by the water rights) (emphasis added). Once the water runs through Reclamation’s turbines, the water has been put to beneficial use and the appropriation of the water right completed. *E.g. Sarret v. Hunter*, 32 Idaho 536, ___, 185 P. 1072, 1074 (1919). What happens to the power is of no consequence. Indeed, taken to its logical end, the Coalition is arguing that a person who toasts wheat bread creates a beneficial interest in both the hydropower storage right used to create the energy powering the toaster, and the irrigation storage right used to grow the wheat.

Federal Claims. ORDER GRANTING at 12. Thus, incorporating those provisions “would insinuate the IDWR Director into contract matters well outside his purview.” *Id.*

Second contracts can and do change. *Id.*; *see also*, *Minidoka Irrigation District v. Dept. of the Interior*, 406 F.3d 567, 571 (9th Cir. 2005) (noting that BID’s contract was amended after the United States purchased BID’s contractual right to part of the profits generated at the Minidoka powerplant). In fact, the Palisades contracts acknowledge that the criteria for determining annual net power losses “may be changed from time to time.” Aberdeen-Springfield Contract, Jarvis Aff., Ex. B at ¶ 24(c). The power loss provisions span seven pages of the Palisades contracts and could be changed in innumerable ways without *any* change in the way the water right is operated. *See id.* at ¶ 24(a) - (f). “Part and parcel” of the exercise of the water right they are not.

D. Even if the “Obsolete” Rights Continue to Exist, There is No Need to Refer to Them in the Remarks.

The SWC’s third alleged deficiency is the remarks’ omission of the references in the Palisades Contracts to diversionary water rights then held by the Twin Falls Canal Company and North Side Canal Company (collectively “Canal Companies”), and certain flow obligations contained in a 1923 contract between the United States and the Idaho Power Company. Those provisions were not carried forward into the proposed remarks because for decades the United States has not been operating the reservoir to provide water for either purpose. Rigby Depo, 2nd Jarvis Aff., Ex. C, at 63:1-5; 79:12-15. The SWC’s objections to the omissions only reiterate that there is no need to reference the rights in the proposed remarks.

The SWC points out that the Canal Companies are pursuing claims in the SRBA. Importantly, those claims are *not* for the diversionary water rights referenced in the contracts. As the SWC explains, the former diversionary rights were “exchanged for preferred space for irrigation storage in American Falls and Palisades Reservoirs.” SWC Brf. at 42; *see also e.g.*, Notice to Claim 01-10042A at 2 (noting that the claim is a part of American Falls Reservoir’s storage water). The effect of that exchange was to move the rights’ point of diversion from below Minidoka reservoir, to above it. Thus even if the Canal Companies succeed in their claims, there would be no reason to reference their rights in the remark because the rights are upstream of Minidoka reservoir and can no longer be affected by the United States’ operation of its Minidoka hydropower water rights.

The SWC also argues that Idaho Power has not conceded that its contract rights are no longer valid and, in fact, is pursuing judicial actions to enforce those rights. *See* SWC Brf. at 44. Although the United States and Idaho Power are presently litigating the scope of Idaho Power’s contract rights in subcase 01-02064, Idaho Power has not challenged the Special Master’s recommendation. Apparently Idaho Power recognizes what the SWC refuses to: there is no need to refer to the 1923 Contract in the remarks for the Minidoka hydropower rights because if Idaho Power prevails in the on-going litigation, the remarks in Subcase 01-02064 will address the United States’ obligations to Idaho Power.

III. THIS COURT CANNOT ADOPT THE EAGLE DECREE REMARK PROPOSED BY THE SWC.

A. The United States is Not Bound By The Eagle Decrees.

The SWC closes its brief by arguing that the only possible remark for water rights 1-217, 1-218, 1-2068 and 1-4054 is one that simply states that “the delivery of water to this right shall be subject to the provisions of the [Eagle Decrees].” SWC Brf. at 84. The Special Master properly rejected the SWC’s proposal because he grasped a simple principle that has continually eluded the SWC: the United States cannot be bound by the Eagle Decree – under any theory – because the proceedings were not a comprehensive adjudication. As Special Master Dolan explained, the *Eagle* proceedings “were private water adjudications binding only the parties - not a McCarran Amendment adjudication. Suggestions that the Eagle Decrees were ‘de jure and de facto’ general adjudications have no merit because Congress waived the United States’ immunity to allow federal water rights to be determined only in *comprehensive* general stream adjudications such as the SRBA.” ORDER GRANTING at 13 (emphasis added). The requirement that an adjudication be comprehensive means that “the rights of *all claimants on the Snake River and all of its tributaries* within the state of Idaho” must be included in an adjudication before the McCarran Amendment’s waiver can apply. *In re Snake River Basin Water System*, 115 Idaho 1, 8, 764 P.2d 78, 85 (1988) (emphasis added). An adjudication of rights above Milner Dam falls far short of that, no matter what the court or the parties’ intention.

Finally, the SWC’s suggestion that the Field Solicitor’s review of a few documents during the Eagle proceedings somehow waived the United States’ immunity cannot stand. The Special Master correctly recognized that “[w]here jurisdiction has not been conferred

by Congress, no officer of the United States has power to give a court jurisdiction of a suit against the United States.”¹⁷ ORDER GRANTING at 13 (quoting UNITED STATES’ 2ND MEMORANDUM IN SUPPORT, at 12, fn. 14, citing *State of Minnesota v. U.S.*, 305 U.S. 382,388-89 (1939); *Stanley v. Schwalby*, 162 U.S. 255, 270 (1896)).

B. Even if the United States Could be Bound by the Eagle Decree, the SWC’s Suggested Remark Would Have to be Rejected.

The Special Master trenchantly observed that the SWC’s “suggestion that the BOR’s water rights should incorporate the Eagle Decrees is attractive in its simplicity, but misleading in its premise and scope.” ORDER GRANTING at 11-12. The Eagle Decrees did not adjudicate any of the rights at issue in this proceeding. The decrees only connection to this proceeding is that they confirmed the Palisades Contracts and included some provisions of those contracts as exhibits.¹⁸ To the extent the United States could be “subject to” the provisions of the Eagle Decrees, the only relevant provisions are those of the Palisades Contracts. Thus a remark referring to the Eagle Decree and its numerous irrelevant provisions would only engender confusion.

¹⁷ The principal that no federal officer can waive the United States’ immunity is so strong that courts have refused to bind the United States even when the Attorney General has authorized federal agencies to file claims in a state adjudication suit. *See In re Bear River Drainage Area*, 271 P.2d 846, 848-9 (Utah 1954); *see also United States v. Oregon Water Resources Dept.*, 774 F. Supp. 1568, 1575 (D.Or. 1991) (consent decrees signed by officials of the executive branch in a state adjudication did not waive the United States’ immunity).

¹⁸ The SWC suggests that if the SRBA decree does not carry forward the Eagle Decree, the ratification of the Palisades Contracts in that proceeding will no longer be binding. SWC Brf. at 37-38. The SRBA Decree will have no effect on the Eagle Decrees’ ratification of the contracts because the SRBA Decree will only supercede the Eagle Decrees’ definition of the water rights, not vacate the decrees’ confirmation of the contracts.

It appears that the SWC wants this Court to include a remark referencing the Eagle Decree as a means to have the water rights incorporate the entirety of the Palisades Contracts - or at least those few provisions omitted in the remarks recommended by Special Master Dolan. *See* SWC Brf. at 28. But as Special Master Dolan found, there is no evidence that the Eagle courts “intended to ‘freeze’ the Contracts in place as decreed elements of the water rights or their administration.” ORDER GRANTING at 11-12. He also noted that “the Contracts contain multiple provisions that go well beyond the elements of Idaho water rights” and that incorporating the entirety of the Contracts “would insinuate the IDWR Director into contract matters well outside his purview.” *Id.* at 12. Those points alone are reason enough to reject the SWC’s Eagle Decree remark.

Nonetheless, the Special Master went on to dismiss a favorite argument of the SWC – the so-called “common plan.” The Special Master found that by confirming the Palisades Contracts the Eagle courts did not mandate a “common plan” that would forever bind the world in how the Snake River is administered. *Id.* Rather, the Eagle Decrees “merely describe a comprehensive plan of operation developed as part of the Palisades project, nothing more.” *Id.* at 12; *see also* ORDER DENYING MOTION TO DESIGNATE BASIN-WIDE ISSUE at 10 (“even though the Eagle Decrees make reference to a ‘common plan’ of administration, the ‘common plan’ is comprised of various contract provisions (or ‘components’) relating to different federal projects.”). Thus “common plan” is no more than a term used to refer to the contracts and provides no basis to compel inclusion of the Eagle Decree in the remarks.

IV. THIS MATTER IS PROPERLY RESOLVED BY SUMMARY JUDGMENT.

Despite the length of the SWC's brief, the issues before this Court are simple, discrete and ready for resolution by the Court. The SWC does not dispute that a remark is appropriately part of the decree for these water rights. In fact, it urges the Court to adopt a remark – albeit a remark the Court cannot adopt. Thus, the dispute between the parties is over whether a handful of words and phrases need to be included in the remarks. The United States has demonstrated that the Court does not need to incorporate any of the provisions advocated by the SWC into the remarks. Nonetheless, should this Court disagree, it may revise the remarks accordingly. *Id.* R. Civ. P. 53(2). Thus the one issue that should not be in dispute is that there is no need for a trial and this matter can properly be resolved on summary judgment.

Despite that, the SWC argues that Special Master Dolan improperly granted summary judgment. SWC Brf. at 34 (citing *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991)). The SWC's argument must fail because it ignores Special Master Dolan's role as the fact finder. As the case the SWC cites makes clear, when sitting as a fact-finder, a court "is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." *Loomis*, 119 Idaho at 437 (citing *e.g., Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982)). That is precisely what Special Master Dolan did. He evaluated the "exhaustive records" assembled by the parties and drew any inferences from those record necessary to resolve the issues before him. *See* ORDER GRANTING at 10. Thus, it is not surprising that despite all the SWC's arm-waving, none of the three issues it claims preclude summary judgment actually do.

First, the so-called “common plan” is no barrier to summary judgment because, as was explained above, it does not exist.^{19/}

Second, the SWC’s argument that the remark would violate both the purposes for which the Minidoka and Palisades Projects were authorized and the Palisades Contracts does not require the resolution of fact issues.^{20/} Regardless of what the remarks say, none of the reservoirs are authorized to store water for purposes other than irrigation, hydropower or flood control. Thus, the SWC’s suggestion that the remarks would open the door to water being stored for “any purpose whatsoever” is pure hyperbole. *Cf.* SWC Brf. at 52.

Finally, the SWC has the temerity to suggest the remarks recommended by Special Master Dolan will create “confusion, not clarity,” despite its advocating for a remark that would incorporate an entire decree rife with water rights and contractual references having nothing to do with the water rights at issue in this proceeding. *Cf.* SWC Brf. at 53. To support

^{19/} Even if there were a “common plan for administration of the Snake River,” the SWC’s desire to have the entire “common plan” addressed in this proceeding – or any single proceeding – would have to be rejected. The Palisades Contracts are rife with provisions that have nothing to do with the issues now before the Court – or with each other. For instance, the contracts include provisions such as the exchange of water between American Falls Reservoir and Jackson Lake, *e.g.*, Aberdeen Springfield Canal Company Contract No. 14-06-W-24 at 18 (attached as Exhibit B to the Affidavit of David A. Jarvis); storage holdover provisions for the reservoirs, *id.* at 10, 16, 20; the so-called “split right” held by American Falls Reservoir District #2, *id.* at 34; distinct storage rights in Island Park Reservoir, *id.* at 24(b); and the priority of water stored in Palisades Reservoir under the winter water savings provisions. *Id.* at 17. These issues are being addressed, or have already been addressed, in distinct subcases. There is no reason for such disparate issues to be wedged into a single proceeding.

^{20/} The SWC also argues that the remarks violate Reclamation’s claims in the SRBA and the Palisades Contracts. The SWC’s suggestion that a claim in the SRBA binds the claimant to the water right as claimed is simply wrong – as the resolution of hundreds, if not thousands, of subcases attests. Further, as was explained above, the remarks are consistent with operations the SWC concedes have complied with the contracts. *See* SWC Brf. at 78.

that contention, the SWC offers a disjointed litany of deposition excerpts, much of which is addressed to Director's recommendations the State no longer supports. The Court need not get bogged down in trying to sort through the SWC's argument for two reasons.

One, the question of whether the remark will promote clarity in administration of the water rights is for this Court to decide. *See, A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, ___, 958 P.2d 568, 571 (1997) (determining whether a general provision facilitates the efficient administration of a water right is a question of law). That task is not difficult because the operative portion of the remarks is quite simple. It requires the United States to limit operation of the hydropower right "except as it is determined by the Secretary that additional water may be passed through Minidoka Dam without loss of water that could be stored in the reservoir system." Except for the omission of the word "irrigation" and obsolete language, the remark is essentially identical to a provision of the Palisades Contracts that has been implemented for fifty years without dispute over its meaning.

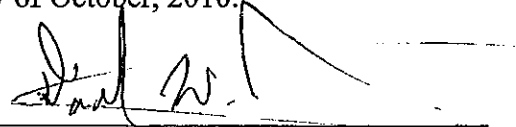
Two, contrary to the SWC's suggestion, the record contains a sufficient factual basis to sustain Special Master Dolan's decision. *Cf.* SWC Brf. at 50. Reclamation's witness Richard Rigby testified that Reclamation has been operating the system consistent with the proposed remarks for decades. Rigby Depo., 2nd Jarvis Aff., Ex. C, at 127:23-128:7; 80:12-18. Similarly, Water District 1 program manager Anthony Olenichak explained that the proposed remarks are consistent with how Water District No. 1 has administered the hydropower water rights. Affidavit of Anthony Olenichak at 2-3 (Aug. 18, 2009). Such evidence is more than sufficient support for Special Master Dolan's decision. *Chisholm v. Idaho Dept. of Water Resources*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2009) (evidence supporting a decision need

only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder).

Conclusion

The Coalition's entire argument rests on their assertion the proposed remarks constitute a "broad," "new" subordination of the Minidoka and Palisades hydropower water rights. That makes it imperative that this Court not lose sight of the uncontroverted fact that the remarks proposed by the United States and the State, and joined by Upper Valley irrigators and groundwater districts, will not change the manner in which Reclamation has operated the reservoirs for decades. In other words, the entire premise of the Coalition's argument is false. From that it follows that this Court should enter judgment adopting the proposed remarks. Even if this Court were to disagree, however, it still can – and should – enter summary judgment because every alleged deficiency raised by the Coalition can be readily addressed by this Court based on the information now before it.

Respectfully submitted this 29th day of October, 2010.

A handwritten signature in black ink, appearing to read "David W. Gehlert", is written over a horizontal line.

David W. Gehlert
Attorney for the United States

CERTIFICATE OF SERVICE

I certify that on October 27, 2010, I served true and correct copies of **THE UNITED STATES RESPONSE TO THE SWC'S OPENING BRIEF ON CHALLENGE** as follows:

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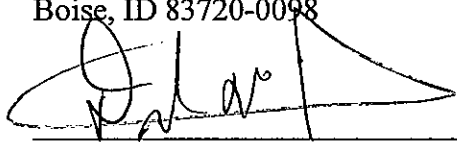
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Attachment A

Subcase Nos.

Minidoka Power Rights

01-00217

01-00218

01-04024

01-04025

Palisades Storage Power Right

01-02068

Palisades Natural Flow Power Right

01-04054