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DEPARTMENT OF
WATER RESOURCES

THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase Nos. 1-217, 1-218, 1-4024, and 1-4025
	)	(Minidoka Power Rights)
Case No. 39576	)	
	)	Subcase Nos. 1-2068 and 1-4054
	)	(Palisades Power Rights)
	)	

SURFACE WATER COALITION'S JOINT REBUTTAL BRIEF ON CHALLENGE

On Challenge from Special Master Dolan's March 25, 2010 Order Granting Motions for Summary Judgment and Special Master Report & Partial Recommendation and the July 29, 2010 Order Denying Joint Motion to Alter or Amend

Honorable Eric J. Wildman, Presiding Judge

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INTRODUCTION

The issues before the Court concern the integrity of prior decrees and contracts and the force and effect they are given in the SRBA. Contrary to the arguments raised by Reclamation and the State, the Coalition is not seeking to disrupt the status quo or to abrogate Reclamation's authority relative to these water rights. Just the opposite, the Coalition seeks to enforce the agreements entered by Reclamation and the provisions that Reclamation demanded be included in the *Eagle Decree*. Moreover, the Coalition seeks to uphold the integrity of the procedures before the SRBA Court rather than rush to judgment on water rights that have been subject to an ever-changing and misunderstood set of remarks offered by IDWR, the State of Idaho and Reclamation.

The Coalition's *Opening Brief on Challenge* provided the Court with an explanation of the history of the water rights at issue here and explained why the remark approved by Special Master Dolan is legally and factually unsupportable.¹ Reclamation and the State ask this Court to ignore this history and view these water rights with blinders. It is with this constricted view of the history that both Reclamation and the State assert Reclamation's authority to subrogate its water rights is unlimited. It is this constricted view that leads the State to argue that Reclamation law automatically subordinates these water rights – regardless of the Palisades Contracts. Finally, it is with this limited view that Reclamation asserts the Coalition is trying to alter the status quo rather than preserve the prior decree that Reclamation openly participated in to ensure the contracts were ratified and adopted for purposes of administration of water rights in the Upper Snake River Basin.

¹ The State provides a truncated view of this history. *Tribes Resp.* at 22-23. They do not even mention that the historic exercise of these rights was governed by the *Eagle Decree* and Palisades Contracts and, before that, by agreement with others (i.e. Idaho Power in the 1930's and 1940's).

Fortunately, the Court is not limited to the narrow review proposed by Reclamation and the State. Rather, as explained in the Coalition's *Opening Brief on Challenge*, the Coalition's objection to the Special Master's recommendation is based on the existing decrees and contracts. History demonstrates a concerted effort on the part of Reclamation and Coalition members – namely, A&B Irrigation District ("A&B") and Burley Irrigation District ("BID") – and Falls Irrigation District ("FID"), among others, to protect the rights to reserved power generated at Reclamation projects. This history shows that Reclamation voluntarily entered into the Palisades Contracts and demanded that provisions from those contracts be included in the *Eagle Decree*. This history cannot be ignored. There is no evidence in the record to justify expanding this language. Accordingly, the Court should reverse the Special Master's recommendation for the above water rights and issue a partial decree that is consistent with the law.²

ARGUMENT

I. Coalition Members Seek to Protect their Interest in the Power Rights.

Both Reclamation and the State contend that the Coalition is attempting to alter the status quo by changing the history of administration of the above water rights. They assert that Reclamation should be allowed to do as it pleases with these water rights – regardless of its impact on those who rely on the hydropower generated by the water rights. Their end goal is to have the above water rights decreed with remarks that expand the scope of historical subordination and ignore other vital components of the historical agreements and decrees.

The response briefs express disdain for the Coalition's efforts to protect its interests. Yet, the reality is that the Coalition members have beneficial interests in these water rights. They are the ones who beneficially use the reserved power generated by these water rights. Indeed, these

² The Special Master's recommendation consists of two orders: (i) March 25, 2010 *Order Granting Motions for Summary Judgment and Special Master Report & Partial Recommendation* and (ii) the July 29, 2010 *Order Denying Joint Motion to Alter or Amend* (collectively referred to as the "Order").

rights were specifically developed to supply power to members of the Coalition, among others. *See Temple Aff.* at 4, ¶ 11; *Bingham Aff.* at 2-3, ¶ 4; *Sorensen Aff.* at 203, ¶ 4. Without this power, A&B, BID and FID could not have delivered water to their respective landowners and the purpose of the Reclamation projects would have been defeated. As such, these Coalition members have a beneficial interest in these water rights. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106 (2007). The State's reliance on *Burley Irr. Dist. v. Ickes*, 115 F.2d 529 (D.C. Cir. 1940), to contradict this clear law is misplaced. In that case, the court held that Reclamation owned the irrigation and power water rights "unabated" and "without qualification." *State Br.* at 11. As the Idaho Supreme Court made clear in *Pioneer Irr. Dist.*, *supra*, that is not the law in Idaho.³ The State wholly ignores the precedent related to Reclamation water rights that was established in *Pioneer Irr. Dist.* Reclamation also ignores this case and the fact that power generated at Minidoka Dam is specifically "reserved" for use by the irrigation project districts.

Furthermore, the fact that the Coalition members have a beneficial interest in these water rights is evidenced by the Palisades Contracts. If Reclamation's and the State's arguments were true, that Reclamation had "unabated" and unqualified ownership of the power rights, there would have been no need for the Palisades Contracts in the first place. If Reclamation could have unilaterally subordinated its power rights at Minidoka Dam why did it seek agreement to obtain "power loss" payments from those spaceholders that would benefit from the irrigation storage?

Coalition members were also parties to the *Eagle Decree* – which incorporated several provisions at the demand of Reclamation. In fact, as explained in Part D.1 of the Coalition's

³ Likewise, contrary to the State's assertion, *State Resp.* at 10, nothing in *Pioneer* requires the Coalition to file a competing claim in order to validate their beneficial interests.

Joint Opening Brief on Challenge, Reclamation actively participated in the drafting of the *Eagle Decree* stipulation.

As parties to the Palisades Contracts and the *Eagle Decree*, the Coalition members have a right to protect the rights and obligations set forth in those documents. Any effort to contradict those documents must be rejected.

II. The Expansive Remark Approved by the Special Master's Order Contradicts the History of Reclamation Entering Into Agreements to Subordinate Power Rights in Its Reservoirs.

There is no dispute that the remark approved by the Special Master's *Order* removes reference to irrigation storage and simply subordinates to all "water otherwise storable in the reservoir system." Reclamation argues that the removal of this phrase is necessary to preserve the status quo and that the non-irrigation water is "so small relevant to the total system capacity (about 1%)" that keeping reference to "irrigation" in the remark "would be a greater risk of a storage shortfall." *Rec. Resp.* at 9-12. The State argues that this is just how the water rights have always been administered. *State Br.* at 20-23. These arguments are wrong and do not justify a revision to the Palisades Contracts and *Eagle Decree* provisions.

A. The Approved Remark Expands the Subordination Agreed to in the Palisades Contracts.

The core issue before the Court is the effect of the removal of "storage from irrigation" from the subordination provisions on the above water rights. The Coalition argues that the failure to limit the scope of subordination – i.e. to "storage from irrigation" – effectively broadens the scope of that subordination. The issue becomes clear when the Court compares the subordination language from the Palisades Contract with that of the recommended remark:

Palisades Contracts: “[I]t will be the objective of the United States in the operation of both its American Falls and Minidoka powerplants to curtail the release of additional water from American Falls Reservoir for power production at those powerplants during the storage season of any year whenever operation of those powerplants to the full extent of their respective water rights for power production would result in a loss of irrigation water otherwise storable in the reservoir system.” Ex. B to *Jarvis Aff.*; Contract at 30-33 (emphasis added).

Recommended Remark: “[I]t will be the objection of the United States in the operation of the Minidoka power plant to limit the exercise of water right nos. 01-217 and 01-218 for power production ... whenever operation of the Minidoka power plant to the full extent of these water rights for power production would result in loss of water otherwise storable in the reservoir system.” *State Br.* at 2 (emphasis added).

On its face, the language in the Special Master provision is far more expansive than the provision agreed to by Reclamation in the Palisades Contract.

Notwithstanding the difference of the two provisions, both Reclamation and the State would have this Court believe that nothing will change – that expanding the language of the subordination provision somehow benefits the Coalition. *Rec. Resp.* at 11. They ask the Coalition to trust that, even though the remark greatly expands the subordination of these rights, things will continue to be operated as they have always been operated. *Id.* They rely on the Special Master’s conclusion that, should Reclamation decide to breach the Palisades Contracts, the Coalition could just sue Reclamation. *Rec. Resp.* at 13-14 (citing *Order* at 12). This “trust us now and sue us later” approach to the power rights is untenable. The Court should finally resolve the issues created by the varying remarks for the Reclamation water rights, not put it off for some other forum to address later.

Furthermore, claiming Reclamation has breached its contracts would likely be futile if the water rights authorized the Watermaster to distribute water to some unknown “storage” uses in the future. Although that vague “storage” use may not be defined or exist today, the blanket subordination on Reclamation’s right ensures its protection in the future.

Since the recommended remark greatly expands the scope of subordination that was negotiated and secured in the Palisades Contracts, and confirmed at Reclamation's request in the *Eagle Decree*, it should be rejected. Any subordination must be limited to storage for irrigation.

B. Since the Senior Minidoka Rights Were Acquired Prior to the 1928 Constitutional Amendment, Reclamation Could Only Subordinate the Water Rights Through Agreement.

Both Reclamation and the State argue that there should be no limit on Reclamation's ability to subordinate the water rights. *Rec. Resp.* at 7-8, n.6; *State Br.* at 12-14. In doing so, both misconstrue the Coalition's arguments. When water rights 1-217 and 1-218 were decreed in 1913, there was no legal authority for the Director to subordinate those water rights. *See P.U.C. v. Natatorium Co.*, 36 Idaho 287 (1922). It was not until 1928, when the Constitution was amended to allow the Director to "regulate and limit the use thereof for power purposes." *Fremont Madison Irr. Dist. & Mitigation Croup v. IGWA*, 129 Idaho 454, 455 (1996). The Director could not unilaterally subordinate the rights – indeed, he had no such authority. Although Reclamation subordinated the rights at Minidoka Dam at various times, it always did so by voluntary agreement and in a manner that ensured the power rights, and those that relied upon the power, would remain whole. As such, in order to subordinate the water rights, a separate agreement was required. Reclamation, therefore, negotiated with the users of the hydropower in order to subordinate those senior hydropower rights to junior irrigation storage – the Palisades Contracts.⁴

⁴ In addition, current Idaho law provides several other limitations on the subordination of water rights. *See Joint Opening Brief on Challenge* Part VIII.B. The State asserts that the Coalition is foreclosed from raising these legal arguments. *State Resp.* at 12-13, n.33. Yet, they cite no legal authority for the assertion that an appellant is constrained by the legal argument made below.

C. The Palisades Contracts Govern Subordination of the Power Rights and Cannot be Ignored.

Citing to *Idaho Power Co. v. State of Idaho*, 104 Idaho 575 (1983), both Reclamation and the State assert that Reclamation is free to voluntarily subordinate the water rights. *Rec. Resp.* at 7-8, n.6; *State Br.* at 12-13. Yet, that case did not involve any water rights to which there was an agreement with third parties, such as Coalition members, to specifically identify the subordination. That case simply involved Idaho Power's agreement to subordinate its own water rights. Idaho Power is a private company and does stand in the same position as Reclamation, the legal title holder of its water rights, and those that have beneficial interests in those rights such as the Coalition members. *Cf. Pioneer, supra*. Moreover, in this case, Reclamation entered into the Palisades Contracts and specifically limited the subordinate to "irrigation water otherwise storable." Ex. B to *Jarvis Aff.* (Contract at 30-33). Reclamation did not subordinate the power rights to all potential uses. *Id.* Coalition members have relied on the limited subordinate of the Palisades Contracts since that time. *See, generally, Bingham Aff.; Temple Aff.; Sorensen Aff.* The *Idaho Power Co.* case simply does not apply here.

Citing to *Ickes, supra*, the State contends that Reclamation law subordinates power generation – regardless of the Palisades Contracts. *State Br.* at 14-23. It concludes that "the status quo has long been that power generation at 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." *Id.* at 14-15. The State's reliance on *Ickes* is misplaced.

First, in *Ickes* the subordination involved was for "irrigation water." 116 F.2d at 536. Here, Reclamation is attempting to subordinate to any and all uses. Second, *Ickes* recognized that "the authority to dispose of surplus power is vested exclusively in the Secretary." *Id.* at 531.

Here, the Secretary exercised this authority when he entered into the Palisades Contract and voluntarily participated in the *Foster Decree* proceedings – thus limiting his rights moving forward. Third, *Ickes* involved the sale of surplus power for commercial uses outside of the Minidoka Project. This case involves the reserved power utilized by the irrigation districts. In short, the *Ickes* decision cannot be read to grant Reclamation the “authority” to ignore its obligations under the Palisades Contract.

Finally, Reclamation law specifically mandates that water rights acquired for Reclamation projects must comply with State law. *Pioneer, supra* at 110 (“A review of the cases makes it clear that federal law defers to state law in determining the rights to water in the reclamation projects”).⁵ Under Idaho water law, first in time is first in right. *E.g.*, Idaho Code § 42-106. Accordingly, while hydropower generation pursuant to water rights developed for a specific reclamation project may be incidental to irrigation storage at that reclamation project, it is not automatically incidental to, or subordinated to, junior irrigation storage at a subsequently constructed reclamation project. As such, it was necessary for Reclamation to enter into the Palisades Contracts in order to subordinate the senior Minidoka power rights to junior irrigation storage at subsequent reclamation projects, such as the Palisades reservoir.

D. Recognition of the Subordination Provided in the Palisades Contracts Will Not Disrupt the Status Quo.

Both Reclamation and the State repeatedly assert that the Coalition is simply seeking to disrupt the status quo – to alter the history of administration. Reclamation even asserts that “to do ... as the Coalition implies Reclamation must, would only increase the risk of water shortages.” *E.g. Rec. Resp.* at 9 & 10. To support their contentions, the State cites to the depositions of Reclamation and Water District 01 employees.

⁵ As such, it is wrong for the State to assert that the Minidoka power rights are subordinated as a matter of federal law. *State Resp.* at 14. Water right development and administration is a matter of state law.

Richard Rigby, Reclamation employee, testified that Reclamation does not distinguish between irrigation and non-irrigation storage. *State Br.* at 21 (quoting deposition testimony). His testimony is consistent with Reclamation's argument that it operates the reservoir system to maximize storage. *Rec. Resp.* at 9-10. Importantly, however, that does not mean that Reclamation can simply ignore the specific subordination agreed to in the Palisades Contracts. Indeed, at oral argument, Reclamation admitted that including the term "irrigation" does not affect Reclamation's ability to maximize storage. *Tr. P.* at 6, *Ins.* 12-16 (including the term "irrigation" "does not make a bit of difference, because maximizing storage generally is exactly the same thing as maximizing storage for irrigation").⁶

Tony Olenichak, Water District 01 employee, testified that the Water District's administration of the power rights would not change with the proposed remark. *State Br.* at 22-23 (quoting deposition testimony). This is not surprising given that 99% of the storage is irrigation storage. *Rec. Resp.* at 10.

Reclamation characterizes the Coalition's arguments as "pure hyperbole" because "none of the reservoirs are authorized to store water for purposes other than irrigation, hydropower or flood control." *Rec. Resp.* at 20. If true, then it is unclear why Reclamation is so adamant about remove reference to irrigation storage from the remark – especially where Reclamation admits that including "irrigation" will not affect the maximization of storage. *Supra.*

⁶ For this same reason, the State's argument that the Coalition is somehow estopped from asserting its position is wholly without merit. *State Resp.* at 35-37. The Coalition's prior actions to defend the right of Reclamation to maximize storage under "spaceholder contracts" and consistent with how the rights were administered under the *Eagle Decree* does not prevent the Coalition from now defending its interests against an attempt to expand the subordination of the power rights. Indeed, Reclamation admits that the arguments are not the same. *See Tr. P.* at 6, *Ins.* 12-16 (including the term "irrigation" "does not make a bit of difference, because maximizing storage generally is exactly the same thing as maximizing storage for irrigation"). Furthermore, the issue of Minidoka power was not part of the *Hodel* case because that issue was previously resolved by subordination in Palisades Contracts and *Eagle Decree*.

Reclamation attempts to deflect from the true issue – recognizing the prior contracts and decrees – by arguing that subordinating only to irrigation storage would create a risk of shortfall. Yet, it never justifies that contention. There is no evidence in the record to support the assertion that subordination to all but 1% of the total system capacity will somehow derail a century of water right administration in the reservoir system. Rather, Reclamation simply makes the assertion and expects the Court and Coalition to accept it as the final word. The law does not require such blind faith in Reclamation’s unsupported contentions.

III. The Water Right Decrees Should Recognize that These Water Rights are Subject to the *Eagle Decree*.

A. The State is Bound by the *Eagle Decree*.

In a confusing change of position, the State attempts to distance itself from the dictates of the *Eagle Decree*. *State Resp.* at 26-30. The State argues that its legal obligation to administer to the decree does not mean that it is actually bound by the *Eagle Decree*. *Id.* This argument is confusing, because the State-appointed Director of the Idaho Department of Water Resources recommended these water rights with reference to the *Eagle Decree*. Moreover, the watermaster supervised and directed by the State was a named party to the *Eagle Decree*.⁷

The State’s new argument is based on its interpretation of *State v. Hagerman Water Right Owners, Inc.*, 30 Idaho 736 (1997). According to the State, the *Hagerman* Court held that the Director is not “obligated to accept a prior decree.” *State Resp.* at 28. Reliance on this single statement selected from the opinion, however, is misplaced. In *Hagerman*, at 741, the Court held that the Director was not required to recommend a previously decreed water right where the evidence shows that it had been “lost or reduced based on evidence that the water rights has been

⁷ It is irrelevant if the watermaster at the time was employed by USGS. Nothing in Idaho law requires a watermaster to be a state employee. See I.C. §§ 42-602, 605. Indeed, the State does not suggest that the Water District 01 watermaster is free to ignore the *Eagle Decree* today.

forfeited, abandoned, or lost through adverse possession.” (Internal citations omitted); *see also* *AFRD#2, et al. v. IDWR, et al.*, 143 Idaho 862 (2007) (although bound by the prior decree, the Director’s administration of water rights may be altered due to “post adjudication factors”). Notably, there are no “post adjudication factors” – such as forfeiture or abandonment – alleged in this case. As such, the ruling in *Hagerman* is not applicable.

In truth, the law demands that the State be bound by the decrees. *Special Master Report & Recommendation*, Subcase Nos. 01-209 *et al* (Feb. 2, 2010) (Minidoka Credit Remark) (“the State Engineer was bound to enforce the terms of the *Foster Decree*”); *see also Order on Motions for Summary Judgment & Order Setting Status Conference*, Subcase No. 01-14 *et. al.* (Junior Natural Flow Subcases) (Nov. 9, 2009) (parties developing water rights after the *Eagle Decree* are bound by its terms). The law governs the Director’s and Watermaster’s obligations in “clear and unambiguous terms,” *R.T. Nahas Co. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988), thus creating a “clear legal duty,” *Musser v. Higginson*, 125 Idaho 392, 395 (1994), that cannot be ignored. The Director originally recognized this fact when he recommended the water rights with a remark referencing the *Eagle Decree*. The State is bound by the decrees and cannot avoid its statutory obligations.

B. Reclamation is Bound by the decrees and Palisades Contracts.

Reclamation’s own actions bind it to the *Eagle Decree*. As explained in the Coalition’s *Joint Opening Brief on Challenge*, at 70-73, Reclamation participated in the *Eagle Decree* process. The final *Eagle Decree* included provisions specifically demanded by Reclamation. It cannot now hide behind a perceived immunity to avoid being bound by the document it helped to craft.

Likewise, Reclamation is bound by the *Foster Decree* – to which it was a voluntary party – and the Palisades Contracts. In those contracts, Reclamation specifically created a common plan for administration of water rights along the Snake River – including the power loss payment program. Reclamation, as a party to the Palisades Contract and *Foster Decree*, cannot take any actions that would impair the rights and obligations created in the contracts. As such, as discussed above, Reclamation it is not free to voluntarily limit its rights.

C. The Water Rights Should Reference the *Eagle Decree*.

These water rights were confirmed in the *Eagle Decree*. The Palisades Contracts were confirmed in the *Eagle Decree*. The process leading up the *Eagle Decree* included Reclamation's participation and demand that certain provisions be contained in the final decree. Both the Palisades Contracts and the *Eagle Decree* remain valid.⁸ Remarkably, however, Reclamation now contends that there should be no reference to the *Eagle Decree* in the water rights. They claim that the *Eagle Decree* is irrelevant and reference to it would only “engender confusion.” *Rec. Resp.* at 17. It cannot have it both ways. Reclamation cannot argue for the inclusion of remarks in a decree then complain when it is bound by the provisions it advocated.

The State attempts to confuse the matter by accusing the Coalition of trying to “incorporate the entirety of the *Eagle Decrees*.” *State Br.* at 23-26. The State quotes the Water District 01 watermaster as stating that not “all portions and remarks set forth in those *Eagle Decree*” are necessary for administration. *Id.* Importantly, the State does not argue that at least portions of the *Eagle Decrees* are relevant to these water rights. Moreover, the fact remains the Watermaster is bound by the *Eagle Decree* and has an obligation to administer water rights in conformance with its terms.

⁸ The fact that the Palisades Contracts remain valid would not prevent the watermaster from distributing water to other non-irrigation storage uses in the future that do not have contracts and do not have to pay power loss. As such, it is necessary to reference the prior decrees and contracts in the SRBA decree.

Referencing the *Eagle Decree*, as outlined by the Coalition, *Opening Brief on Challenge* at 83-84, does not necessarily mean that every provision – even those that are not applicable to these water rights – will be applied to these water rights. Indeed, the Director agreed that the *Eagle Decree* should be referenced when it included reference to the decree in the original recommendation. *Id.*⁹ There is no reason to delete reference to the *Eagle Decree*.

Even if, *arguendo*, Reclamation was not bound by the *Eagle Decree*, reference may still be made to the *Eagle Decree* in the SRBA decrees. A partial decree should include “such remarks and other matters as are necessary ... for administration of the right by the Director.” Idaho Code § 42-1411(2)(j). As explained in the Coalition’s *Joint Opening Brief on Challenge*, at 15-19 & 35-44, the *Eagle Decree* confirmed the common plan for the administration of water rights in the upper Snake River basin and confirmed the Palisades Contracts. *See* Ex. E to *Stanish Aff.* (*Eagle Decree* at 19). Its provisions, therefore, are relevant and “necessary” for the administration of the water rights.

IV. The Partial Decrees Should Reference the Power Loss Provisions of the Palisades Contract.

It is undisputed that the Palisades Contracts were confirmed, in total, in the *Eagle Decree*. As such, the power loss provisions of the Palisades Contracts are part and parcel of the exercise of the water rights.¹⁰ This does not mean that the Water District must become involved in the process, it only ensures that those irrigation storage rights that receive the benefit of the subordination do so under the condition agreed to in the Palisades Contracts and confirmed in the *Eagle Decree*.

⁹ As such, it is misleading for Reclamation to identify the remark as one “proposed by the SWC.” *Rec. Resp.* at 16.

¹⁰ The assertion that the Palisades Contracts cannot be referenced in the decrees because contracts may change over time, *Rec. Resp.* at 14, is without merit. While contracts may change over time, the *Eagle Decree* will not and, as discussed, herein, is binding on the State and Reclamation.

Reclamation disagrees, arguing that there is no precedent for including reference to the provision and quoting the Special Master as concluding that such a reference would “insinuate the IDWR Director into contract matters.” *Rec. Resp.* at 13-14 (citing *Order* at 12). These arguments are wrong. At Reclamation’s request, the *Eagle Decree* confirmed the Palisades Contracts.¹¹ As such, it is necessary and appropriate to include reference to the Palisades Contracts – including the power loss provisions – in the decrees. Idaho Code § 42-1411(2)(j) requires that the Court include any remarks that are “necessary for definition of the right, for clarification of any element of a right, or for administration of the right.” Such a remark reference the power loss provisions are necessary here. This fact is made evident by Reclamation’s vigorous efforts to remove “storage for irrigation” from the subordination provision. It claims that removal is necessary to ensure the maximization of storage. *Rec. Resp.* at 10-11. Yet, it readily admits that the inclusion of “irrigation” in the remark will not impact the efforts to maximize storage. *Tr. P.* at 6, *Ins.* 12-16. Accordingly, such a remark is necessary to further define and clarify the water rights.¹²

Likewise, given’s Reclamation’s efforts to expand the subordination of the water rights, the existing remark does not adequately protect the Coalition’s interests. *See State Resp.* at 18. Accordingly, reference to the power loss provision should be included in the partial decrees.

V. Summary Judgment is Not Appropriate Where there are Questions of Material Fact.

Rather than respond directly to the Coalition’s arguments, Reclamation simply concludes that summary judgment is not appropriate and accuses the Coalition of being foolish and reckless

¹¹ Given its efforts to incorporate reference to the Palisades Contracts into the *Eagle Decree*, Reclamation’s contrary efforts in this case are surprising.

¹² For this same reason, the State’s contrary arguments are wrong. *See State Resp.* at 18-20.

for arguing otherwise. *Rec. Resp.* at 19-22. The State does not even respond to the Coalition's arguments regarding the questions of fact left open after the Special Master's decisions.

First, contrary to Reclamation's assertion, the "common plan for the administration of the Snake River" confirmed through the *Eagle Decree* is not a figment of the Coalition imagination. *Rec. Resp.* at 18 & 20. The Special Master recognized that there is a common plan. *Order* at 11 (finding that the *Eagle Decree* "judges agreed with the parties that the Contracts were 1) binding on all parties and 2) *constitute a common plan for administration of the Snake River above Milner Dam*"). Reclamation admits that the Palisades Contracts created a "system." Tr. P. at 100-01 ("There wasn't enough water to fill the reservoir, and they went out and they negotiated with the irrigation districts and other water right holders to create a system that would provide enough water"). Indeed, these documents establish a system of operation for the Upper Snake River Basin that was confirmed and ratified by the *Eagle Decree*. Ex. E to *Stanish Aff.* (*Eagle Decree* at 19). Yet, Reclamation and the State advocate for the piecemeal dismantling of that common plan.

Furthermore, there is a question as to how the water rights would be administered with the proposed remark. Reclamation defers to the State and the State simply waits until the end of the season to account for that water. *See Joint Opening Brief on Challenge* at 43-48. Furthermore, there is confusion as to what the proposed remark actually means and how it should be interpreted. *Id.* at 48-53.

Contrary to Reclamation's assertion, the Coalition's discussion is not limited to testimony addressing the original recommendation. *Rec. Resp.* at 21. Rather, the record shows a clear confusion over the interpretation of the recommended remark. *Joint Opening Brief on Challenge* at 50. Furthermore, Mr. Rigby's testimony that Reclamation has historically operated the system

to maximize storage does not mean that “irrigation” should be removed from the remark. *Rec. Resp.* at 21. Indeed, Reclamation admits that the inclusion of “irrigation” will not have any impact on the maximization of storage. *Tr. P.* at 6, lns. 12-16.

Just because this matter is being tried by a Special Master and not before a jury does not give the Special Master the ability to conduct a trial by summary judgment. Since there are unresolved questions of fact, summary judgment was inappropriate.

VI. The Procedures Employed by the Director and IDWR are Contrary to Law.

Idaho law is clear. The Director issues a recommendation and provides his expertise to the Court to support that recommendation. Idaho Code §§ 42-1411 & 42-1401B. In this case, however, the Director reversed course and determined that the recommendations were incorrect. Rather than issuing a revised recommendation, the Director participated as a witness for one of the objectors in challenging the initial recommendation. The State attempt to justify the Director’s actions by asserting that the Director’s actions were the result of a normal negotiation and resolution process and that the Director’s actions were within his authorities provided under law. *State Resp.* at 30-33.

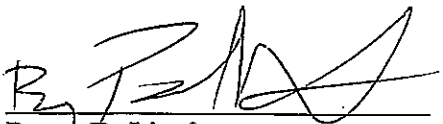
Importantly, nowhere in the law does it give the Director the authority to act as a witness in the SRBA. To the contrary, Idaho law specifically limits the Director’s authority in the SRBA Court to that of an “independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported.” Idaho Code § 42-1401B. None of the law cited by the State gives the Director any more authority in the SRBA Court. As such, the Director has no authority to act as a witness for any party in the SRBA. If the Director feels so strongly that his original recommendation was in error, then a new recommendation should have

been issued. Since he participated as a witness and failed to issue a new recommendation, the Director violated the law.

CONCLUSION

The Coalition is not trying to alter the status quo. Rather, the Coalition seeks to protect its interests in the Palisades Contracts and *Eagle Decree*. Reclamation's and the State's attempt to expand the subordination is inconsistent with the law and facts and should be rejected.

DATED this 12th day of November, 2010.



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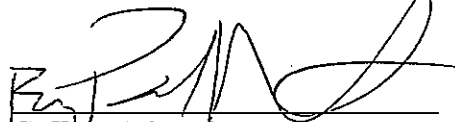
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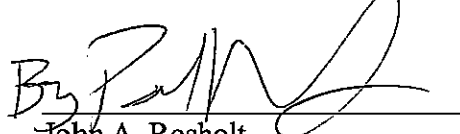
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2010, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S JOINT REBUTTAL BRIEF ON CHALLENGE** on the following by the method indicated:

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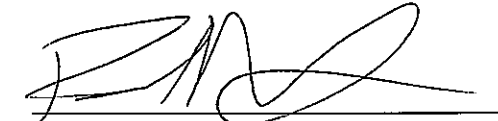
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