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DEPARTMENT OF
WATER RESOURCES

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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
Case No. 39576

)
) Subcase Nos. 01-00217, 01-00218,
) 01-04024, and 01-04025
) (Minidoka Power Right)

)
) Subcase Nos. 01-2068 and 01-4054
) (Palisades Power Rights)

)
) **MEMORANDUM IN SUPPORT OF**
) **SWC'S JOINT MOTION FOR**
) **RECONSIDERATION**
)

COME NOW, A & B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Falls Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company, collectively referred to herein as Surface Water Coalition (SWC), by and through counsel of record, and hereby submits its *Memorandum in Support of SWC's Amended Joint Motion for Reconsideration*.

BACKGROUND

The State of Idaho filed its Motion for Partial Summary Judgment in the six subcases at issue on August 18, 2009. Ultimately that motion was joined by the U.S. Bureau of Reclamation (BOR). In summary, the State's and BOR's Motion for Partial Summary Judgment sought to substitute their agreed upon remarks in place of the Director's Recommendation relating to "historic practice" and "winter power operation." SWC filed its Joint Memorandum in Opposition to State of Idaho's and United States' Motions for Summary Judgment on November 3, 2009.

The motions for summary judgment by the State and BOR were granted on March 25, 2010. SWC filed its Joint Motion to Alter or Amend on April 28, 2010. The Motion was denied on July 29, 2010. In his Order Denying Joint Motion to Alter or Amend, Special Master Dolan clearly rearticulated several holdings from his prior Order Granting Motions for Summary Judgment. Those holdings include the following: 1. The State...[is] not bound by the Eagle Decrees; 2. "The remarks proposed by the State and the United States amend contracts, not elements of water rights; 3. The United States, as sole claimant, is free to voluntarily limit its hydropower water rights; 4. The Palisades Contracts may be amended from time to time as

conditions change, all without court intervention; and, 5. The Surface Water Coalition's remedy for breach of contract is a matter for the Court of Federal Claims, not the SRBA Court.

SWC filed a Notice of Challenge, and this Court entered its Memorandum Decision and Order on Challenge on February 9, 2011. The Memorandum Decision and Order on Challenge adopted the Findings of Fact and Conclusions of Law contained in the Special Master's Order *Granting Motions for Summary Judgment and Special Master Report and Partial Recommendation*, and in the *Order Denying Joint Motion to Alter or Amend* in their entirety.

Because the facts relating to arguments for both sides of the disputed issues have been extensively set forth before this Court, the facts set forth in this Memorandum will be limited to the discrete issues on which SWC is seeking reconsideration.

SWC is seeking reconsideration of the holding that the State of Idaho is not bound by the *Eagle Decree*. It is SWC's position that the State of Idaho, through Henry C. Eagle, the duly appointed watermaster under Idaho Code § 42-605, is bound by the terms of the *Eagle Decree*. Furthermore, if the State of Idaho is not bound by the terms of the *Eagle Decree*, then the question becomes which state employees and/or agencies are bound for purposes of administration of the water rights at issue in these subcases. Finally, there was insufficient evidence in the record upon which the Court could sustain the summary judgment holding that the State is not bound as a matter of law.

SWC is also seeking reconsideration of the various holdings which amount to the ruling that the BOR can voluntarily subordinate its water rights regardless of whether or not such subordination would be a unilateral amendment of, or effectively a breach of, the Palisades contracts. Finally, it is also SWC's position that genuine issues of material fact exist as to the

meaning of the agreed upon “remarks” and whether they violate the provisions of the contracts Reclamation entered into with SWC.

With respect to whether or not the State is bound by the Eagle Decree, the only facts in the record are that Henry Eagle was a U.S.G.S. Engineer who was appointed by the State Reclamation Engineer (predecessor of the Director of the Idaho Department of Water Resources) as watermaster, and that the current watermaster, Lyle Swank, is an employee of IDWR, See *Affidavit of Lyle Swank*, ¶ 2; Ex. M to *Affidavit of David Stanish*; Ex. D to *Affidavit of W. Kent Fletcher (Fletcher Aff.)* filed in support of *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*; Swank Depo. Further, Lyle Swank testified that as watermaster, he is bound by the existing decrees. *Id.* The State did not cite any law or facts to support its theory that it is not bound by the terms of the *Eagle Decree*.

With only these facts in the record, the Special Master concluded that “The State is not bound [by the *Eagle Decree*] because it was not a party and Water District 01 watermaster Henry Eagle, a USGS employee at the time, lacked authority to bind the State in its sovereign capacity.” See *Order Granting Motions for Summary Judgment*, p. 13. He articulated the same holding in his *Order Denying Joint Motion to Alter or Amend* at p. 5.

This Court did not analyze that holding but simply stated “The Special Master did not err in holding that the Eagle Decree is not binding on the USBOR, which undisputedly was not a named party to the adjudication, or the State of Idaho. *Memorandum Decision and Order on Challenge*, p. 13 (underlined emphasis added).

These findings raise significant issues that have not been addressed by the Special Master or the Court. It is uncontroverted that the watermaster, as an appointee of IDWR, is bound by the Decree. IDWR has assumed the duties and role of watermaster and supervises all water distribution in the state. Here, the State of Idaho does not argue that the IDWR watermaster is not bound by the decree. The question then becomes, if the IDWR watermaster is bound by the decree, how is the State, in some other capacity, not bound? At a minimum, a genuine issue of material fact exists as to which state employee and agencies are bound by the terms of the *Eagle Decree*. Further, the record in this matter is void of evidence which could possibly establish that the State's and BOR's remarks would not amount to breach of the contracts BOR entered into with the SWC and which were incorporated verbatim into the *Eagle Decree*. Instead, the State, who is not a party to the contracts and claims not to be a party to the decree, and the BOR have simply attempted to assure this Court that their proposed remarks would not alter, amend or modify the contracts, and that appears to be the factual basis for upholding summary judgment on that issue. See *Memorandum Decision and Order on Challenge*, p. 24. This raises another issue not addressed by the Court – what standing did the State have to stipulate to the terms of these water rights if the State was not a party to the Decrees recognizing the water rights or the contracts describing operations pursuant to the water rights? These issues should be reconsidered by this Court.

ARGUMENT

The State of Idaho, through Henry C. Eagle, the duly appointed watermaster under Idaho Code § 42-605, is bound by the terms of the *Eagle Decree*. This fact is undisputed. While the State of Idaho may not have appeared in name in the Eagle Decree proceedings, Henry Eagle, in

his capacity as a State appointed watermaster, did. Henry Eagle was the appointed watermaster for what is now Water District 1. He was the head of an agency and instrumentality of the State, regardless of the fact that at that time he was appointed that he was also a U.S.G.S. Engineer. His successor watermasters are bound by the Decree, and so is the Idaho Department of Water Resources for purposes of administration of the water rights in Water District 1. If the agencies of the State are bound by the Eagle Decree, how can the State itself not be?

Moreover, in holding that BOR can voluntarily subordinate its water rights regardless of whether or not such subordination would be a unilateral amendment of, or effectively a breach of, the Palisades contracts, the Special Master and this Court have disregarded the effect of the contracts as an affirmative defense to the BOR's position in these subcases. It is true that if the SWC wishes to file a breach of contract claim on those contracts, it must do so in the Federal Court of Claims. However, it is equally true that the existence of those contracts creates a valid affirmative defense in this action to the BOR taking a position that would amount to a breach of those contracts. The Court cannot simply sanction BOR's actions to agree upon remarks contrary to the express terms of the Palisades contracts. Where BOR specifically agreed to subordination of the water rights in the Palisades contracts (and as further decreed in the *Eagle Decree*), it is barred from agreeing to a different subordination in the SRBA.

Finally, genuine issues of material fact exist as to the meaning of the agreed upon "remarks" and whether they violate the provisions of the contracts Reclamation entered into with SWC.

I. IT WAS INAPPROPRIATE TO GRANT SUMMARY JUDGMENT IN FAVOR OF THE STATE ON THE ISSUE OF WHETHER IT IS BOUND BY THE *EAGLE DECREE*.

The SWC is asking this Court to reconsider its holding that the State of Idaho is not bound by the *Eagle Decree*. The correct holding is that because the watermaster was party to the adjudication, he and his successors are bound by the adjudication, IDWR has assumed the duties and role of watermaster, and IDWR's employee, the current watermaster, is bound by the Decree. As a result, the State is also bound and must abide by the terms of the *Eagle Decree*.

A. The Department of Water Resources is Bound by the *Eagle Decree*; this relationship Binds the State of Idaho.

In Idaho, the watermaster is a public administrative officer. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 390, 263 P. 45, 48 (1927). The Director of IDWR supervises the state's watermasters. See Idaho Code § 42-602. By law, water districts are "considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators." I.C. § 42-604. Moreover, the summary supplemental adjudication statute in effect at the time of the *Eagle Decree* adjudication provided that a party may bring an action "against the watermaster...or if there be no watermaster thereof, then against the department of reclamation." See I.C. § 42-1405 (1948); *Memorandum Decision and Order on Challenge*, Ex A, p. 3. It is clear from the statute that the effect of joining the watermaster or the department of reclamation itself would be the same for purposes of binding the agency for water right administration.

Finally, it is the opinion of the Attorney General that:

Water District 1 is an instrumentality of the state established by a predecessor of the Director (Director) of the Department of Water Resources, pursuant to Idaho Code § 42-604, for the purpose of assisting the Department in carrying out its responsibility to distribute the public waters of the state in accordance with the rights of prior appropriation. (emphasis added)

Attorney General Opinion No. 91-7, attached hereto and incorporated herein as Ex. A to the *Affidavit of Travis L. Thompson (Thompson Aff.) RE: SWC's Joint Amended Motion for Reconsideration*.

Factually, Henry Eagle was watermaster for Water District 36, which is now Water District 01. Mr. Eagle was appointed to the position of watermaster by the then Idaho State Reclamation Engineer, R. Keith Higginson, who today would be the Director of the Department of Water Resources. *Affidavit of Lyle Swank*, ¶ 2; *Affidavit of David Stanish*, Ex. M. In the *Eagle Decree* proceedings, Mr. Eagle formally appeared and was represented by the Idaho Attorney General's office. See Exhibit M to *Affidavit of Travis L. Thompson (Thompson Aff)* filed in support of *Surface Water Coalition's and Idaho Power Company's Joint Memorandum in Opposition to State of Idaho and United States' Motions for Summary Judgment*. This is because it is the duty of the attorney general to represent the State and all departments, agencies offices and other State agencies. I.C. § 67-1401(1).

Additionally, one need look no further than Henry Eagle's letterhead during the time of the *Eagle Decree* adjudication to see that the State's interpretation of the legal effect of the Henry Eagle's position is disingenuous at best. Front and center, the letterhead reads "State of Idaho, Department of Reclamation, H.C. Eagle, watermaster." Ex. B to *Thompson Aff. RE:*

SWC's Amended Joint Motion for Reconsideration. The letterhead bears the Seal of the State of Idaho and includes the name of then State Governor, Robert E. Smylie, and the name of the State Reclamation Engineer, R. Keith Higginson. Whatever else Mr. Eagle might have been, he clearly was a representative of the State of Idaho in the *Eagle Decree* adjudication.

As watermaster, Henry Eagle was the “head” of the instrumentality of the State of Idaho whose purpose was to carry out the State’s duty to distribute water in accordance with the prior appropriation doctrine. See Ex. A to *Thompson Aff. RE: SWC's Amended Joint Motion for Reconsideration*.

All of this information leads to the inevitable conclusion that the predecessor agency to the Department of Water Resources was, in all aspects, bound by the *Eagle Decree* adjudication. As a result, the State of Idaho must be similarly bound.

B. The State cannot collaterally attack the *Eagle Decree* where its agency was a party to the adjudication.

Res judicata binds not only parties, but also those in privity with the party. See *Knox v. State ex rel. Otter*, 148 Idaho 324, 223 P.3d 266, (2009). Privity is a question of fact which usually cannot be resolved summarily. *Gubler v. Hardin*, 125 Idaho 107, 110 867 P.2d 981, 984 (1994). Generally stated, a party is in privity with another when it “derived a direct interest in the outcome of the former litigation from the prior [party].” *Id.* So, as simple as it sounds, the pivotal question that was never addressed by either the Special Master or this Court is whether the State of Idaho is in privity with its instrumentality, IDWR.

The answer is clear. The State operates through its instrumentalities and agencies. The “State” does not exist independent of these various agencies. Therefore, any interest it has must be derived from its agencies.

By way of example, consider litigation involving the Idaho Department of Health and Welfare. The Idaho Department of Health and Welfare is an instrumentality and agency of the State, just like IDWR. As an instrumentality of the State, the Department of Health and Welfare is typically represented by the Attorney General’s office, just like the *Eagle Decree* proceedings. If a decision is rendered on its merits, as with the *Eagle Decree* proceedings, can the State of Idaho in its *sovereign capacity* then argue that while the Department of Health and Welfare may be bound by that decision, the State is not? Of course it cannot. The State is in privity with its instrumentalities, and must abide by such decisions.

Thus the assertion that the State is not bound by the *Eagle Decree* as though it were a named party is without merit and legally wrong. In its *Reply Brief* in support of its motion for summary judgment, the State simply argued that it was not bound. It cited no authority, and could not.

For all these reasons, a summary judgment holding that the State is not bound by the *Eagle Decree* is inappropriate and should be reconsidered.

C. Under any circumstances, there was no evidence in the record that would permit summary judgment on the issue that the State is not bound by the *Eagle Decree*.

As the moving party, the State of Idaho bore the burden of establishing that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. I.R.C.P. 56; *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064 (2008).

The State cited no law on this issue. Factually, it was asserted by the State that Henry Eagle was a U.S.G.S. Engineer who was appointed by the State Reclamation Engineer (today's Director of the Department of Water Resources). See *Affidavit of Lyle Swank*, ¶ 2; *Affidavit of David Stanish*, Ex. M. Apparently on these facts alone, the Special Master concluded that "The State is not bound [by the *Eagle Decree*] because it was not a party and Water District 01 watermaster Henry Eagle, a USGS employee at the time, lacked authority to bind the State in its sovereign capacity." See *Order Granting Motions for Summary Judgment*, p. 13. He articulated the same holding in his *Order Denying Joint Motion to Alter or Amend* at p. 5.

This Court did not analyze that holding but simply stated "The Special Master did not err in holding that the Eagle Decree is not binding on the USBOR, which undisputedly was not a named party to the adjudication, or the State of Idaho." *Memorandum Decision and Order on Challenge*, p. 13 (underlined emphasis added).

The uncontroverted facts would support the opposite conclusion. The watermaster was a party to the Eagle Decree. IDWR has assumed the duties and role of watermaster, and the current watermaster is an employee of IDWR. IDWR is a State agency with privity to the State. There are no facts in the record supporting why the State, standing apart from IDWR, would have any right to or interest in a deviation from the terms of the *Eagle Decree*. Moreover, there is no evidence that the State of Idaho contested or disputed the administration pursuant to the subordination provisions expressly stated in the *Eagle Decree*. Since the watermaster was bound by the decree the State of Idaho could not challenge its provisions.

Without more, and without citation to any supporting law, the facts in the record cannot support the summary judgment holding that the State is not bound by the *Eagle Decree*.

II. THE CONTRACTS BETWEEN THE BOR AND SWC PREVENT THE BOR FROM TAKING A CONTRARY POSITION IN THE SRBA.

A. The contracts between the BOR and SWC prevent the BOR from taking an inconsistent position in the SRBA.

The contracts between the BOR and SWC parties (Palisades Contracts) should be given weight in analyzing whether the BOR can voluntarily subordinate its water rights. SWC recognizes that it cannot bring a breach of contract claim against the BOR in the SRBA. However, the Palisades Contracts effectively serve as an affirmative defense to the BOR taking a position in this litigation that is inconsistent with the contracts.

This is prevented by the theory of estoppel, which is grounded on the idea “that it would be inequitable to allow a person to induce reliance by taking a certain position and thereafter take an inconsistent position when it becomes advantageous to do so.” *Gafford v. State*, (In Re Gafford) 127 Idaho, 472, 477, 903 P.2d 61, 66 (1995). Recognizing that estoppel is usually asserted when a party takes inconsistent positions in two judicial proceedings, in its most basic form, a party is denied the right to plead or prove a certain position because of something it has done earlier. See generally *Boesiger v. Freer*, 85 Idaho 551, 559, 381 P.2d 802, 806 (1963).

It is SWC’s position that while this is not the forum for a breach of contract action, the Palisades Contracts, and any potential breach thereof, must be considered by this Court when determining whether to enter a partial decree which could very well amount to judicial approval of a breach of contract. To make the example more apparent, if BOR entered a contract explicitly stating “BOR will not do X,” the BOR would be estopped from taking a position in any litigation that is inconsistent with its contractual obligation to not do “X,” if such position would be detrimental to a party to the contract who is also a party to the litigation.

Accordingly, if in fact the BOR's position in this action would be a breach of the Palisades Contracts, then principles of estoppel preclude the BOR from taking such a position here in the SRBA. Any other result would amount to a usurpation of SWC's contractual rights in an action collateral to those rights.

B. Genuine issues of material fact exist as to the meaning of the agreed upon "remarks" and whether they violate the provisions of the Power Rights Contracts.

It was inappropriate to uphold the summary judgment ruling that "remarks" proposed by the State and BOR do not violate the provisions of the Palisades Contracts. "The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact." *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064 (2008).

Here, despite the voluminous record before the Court, there are no facts that would allow the conclusion that the "remarks" proposed by the State and BOR do not violate the Palisades Contracts, particularly when the State's witnesses offered differing testimony as the remarks' meaning for purposes of administration.

Interim Director Spackman testified there is "an element of subordination" in the proposed remarks, even though the word "subordination" is not used. He also recognized that the remark proposed by the State of Idaho and BOR posed a "possibility of departure." See Ex. B to *Affidavit of W. Kent Fletcher (Fletcher Aff.)* filed in support of *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*; Spackman Depo. at 60-63. Former Director Tuthill testified that the proposed remarks "allows the power plant to run at 2700 cfs before the storage is completely full upstream," and "would not be complete subordination." Ex. C to *Fletcher Aff.*;

Tuthill Depo. at 62, 108. In contrast to both of these interpretations, Water District 01 watermaster, Lyle Swank, testified that the proposed remark would be a subordination “to all other upstream rights other than power generation, but that the *Eagle Decree* subordinates the Minidoka power rights only to storage for irrigation, and not any other use.” Ex. D to *Fletcher Aff.*; Swank Depo. at 49, 58.

On one hand, no one disputes the fact that the proposed remarks *are* different than the contracts. On the other hand, the only assurance (which is not a true “fact” in the record) this Court has that the “remarks” would not amend or breach the Palisades Contracts is that the State and the BOR have stated that the remarks will not. Unfortunately, the effect of the proposed remarks is simply unknown.

Without a clear factual record establishing that the State and BOR’s proposed remarks would not amend or breach the Palisades Contracts, it was inappropriate to grant or uphold a summary judgment ruling that “contractual rights...are in no way affected by the remarks proposed by the State and the USBOR.” At a minimum, the Court cannot ignore the conflict created by the new subordination remark and the subordination BOR agreed to in the Palisades Contracts, and approve BOR’s contrary position as a matter of law.

CONCLUSION

For the reasons set forth herein, SWC respectfully asks this Court to reconsider its *Memorandum Decision and Order on Challenge*.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2011, I served a true and correct copy of the foregoing document on the person(s) listed below via First Class U.S. Mail, pre-paid, and electronic mail as indicated:

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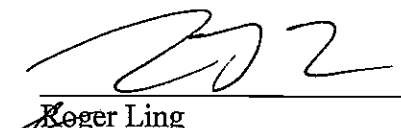

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