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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	)	Subcase Nos. 01-00217, 01-00218, 01-04024,
	)	and 01-04025 (Minidoka Power Rights)
Case No. 39576	)	
	)	Subcase Nos. 01-02068 and 01-04054
	)	(Palisades Power Rights)
	)	
	)	THE UNITED STATES' RESPONSE TO
	)	SWC'S JOINT AMENDED MOTION
_____	)	FOR RECONSIDERATION

Introduction

The Surface Water Coalition's ("SWC") *Amended Motion for Reconsideration* alleges this Court's Order on Challenge needs to be reconsidered and/or clarified in four respects.^{1/} SWC's Joint Amended Motion for Reconsideration at 2-3. This memorandum addresses only points 3 and 4 of the SWC's Motion because only those points directly implicate

^{1/} This Court's *Order on Motion to Strike...* indicated the Court will treat the *Motion for Reconsideration* as a Rule 59(e) motion to alter or amend the judgment. Nonetheless, the United States will to refer to the SWC's motion by its title.

the United States. Both those points suggest the remarks approved in this Court's *Order on Challenge* would "violate" provisions of contracts between the United States Bureau of Reclamation ("Reclamation") and members of the SWC. *Id.* at ¶¶ 3 & 4. Neither point offers a reason for this Court to alter or amend its *Order*. To the contrary, both improperly ask this Court to address arguments not raised in the SWC's challenge, both address matters over which the Court has no jurisdiction and both have no merit.

Argument

I. THE MOTION FOR RECONSIDERATION MUST BE DENIED BECAUSE IT PRESENTS NEW ARGUMENTS.

The Court's *Order on Motion to Strike* explained that "the Court will not consider new arguments made in the *Motion for Reconsideration* not raised in the parties' briefing on *Challenge*." *Order* at 2. As a result, this Court must deny the SWC's Motion.

The SWC's first argument offers two propositions: (1) the Palisades Contracts constitute an "affirmative defense" and (2) the United States should be estopped from pursuing the remarks approved in this Court's *Order on Challenge* because the remarks do not repeat the contract terms verbatim. *See* Memorandum in Support of SWC's Amended Joint Motion for Reconsideration at 12-13 ("SWC Mem."). The SWC's second argument also invokes the contracts by claiming that issues of material fact exist as to whether the remarks violate the contracts. *Id.* at 13-14.

The SWC's briefing on *Challenge* never claimed that the contracts amount to an affirmative defense, or that the contracts constitute grounds for estoppel or that issues of material fact prevent this Court from addressing whether the remarks violate the contracts. In short, while the SWC's lawyers have displayed great creativity by developing new legal theories in what is

now the fourth round of briefing in these proceedings, this Court cannot have “disregarded” arguments that were never put before it. *Cf.* SWC Mem. at 6.

This Court was unquestionably correct in instructing that the SWC can not pursue new argument through a Rule 59(e) motion. *Coeur d'Alene Mining Co. v. First National Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). Having failed to raise any of the arguments supporting its Motion while on *Challenge*, the SWC is precluded from doing so now. Accordingly, the *Motion for Reconsideration* must be denied.

II. ALTERNATIVELY, THE MOTION FOR RECONSIDERATION MUST BE DENIED BECAUSE IT RAISES ISSUES OUTSIDE THE SCOPE OF THIS COURT’S JURISDICTION AND HAS NO MERIT.

Even if the Motion for Reconsideration could be considered to be addressing claims raised on Challenge, it would still have to be denied because the Motion is little more than a thinly veiled attempt to lure this Court into ruling on issues the SWC concedes the Court lacks jurisdiction to address.

However reluctantly, the SWC concedes that “it cannot bring a breach of contract claim against the BOR in the SRBA.” SWC Mem. at 12; *Id.* at 6 (acknowledging that if the SWC “wishes to file a breach of contract claim on [the Palisades] contracts, it must do so in the Federal Court of Claims”). Despite that well founded concession, the SWC’s first argument addressed to the United States asserts that this Court must consider whether the remarks constitute a breach of contract because “if in fact” the United States is in breach, the United States should be estopped. SWC Mem. at 12-13. Similarly, the SWC’s second argument bemoans the alleged absence of “facts that would allow the conclusion that the ‘remarks’

proposed by the State and the BOR do not violate the Palisades Contracts.”^{2/} *Id.* at 13. The SWC raises these arguments in an alleged attempt to prevent “a usurpation of SWC’s contractual rights.” *Id.* at 13. Having conceded that the only forum capable of addressing an alleged “usurpation” of the SWC’s contract rights is the Court of Federal Claims, the SWC has conceded its arguments offer no basis for this Court to alter or amend its *Order*.

Finally, the SWC’s Motion must be denied because its arguments are as lacking in merit as they are jurisdictionally deficient. The SWC’s estoppel argument cannot succeed for two reasons. First, estoppel is rarely, if ever, available against the government. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 419-423 (1990). Second, even if estoppel were available, the authority the SWC relies on demonstrates that it is inapplicable here. In *In re Gafford*, 127 Idaho 472, 477, 903 P.2d 61, 66 (1995) the Idaho Supreme Court explained that a prerequisite for the application of estoppel is inconsistent positions. Here the United States has consistently argued the remarks are consistent with the contracts. *E.g.*, U.S. Mem. in Supp. of Motion for Summary Judgment at 2. Moreover, as was noted above, Mr. Rigby has testified the remarks are consistent with historic operations and that those operations conform to the contracts.

The SWC’s attempt to find genuine issues of material fact is no more successful. This Court’s Order on Challenge correctly recognized that there are no issues of fact which preclude summary judgment. *See Order* at 29. Indeed, the SWC does not claim that genuine

^{2/} Although the question of the United States’ compliance with its contractual obligations is beyond the scope of this Court’s jurisdiction, the SWC’s claim is simply wrong. The deposition testimony of former Reclamation employee Richard Rigby establishes that (1) the proposed remarks are consistent with Reclamation’s historic operations; (2) those operations have complied with the contracts and (3) there is no need to amend the contracts. *See Deposition Testimony of Richard Rigby* at 80, 47 and 53.

issues of material fact preclude resolving this Case on summary judgment. Rather, the SWC takes issues with Special Master Dolan's alleged "ruling that 'remarks' proposed by the State and BOR do not violate the provisions of the Palisades Contracts." SWC Mem. at 13. Not only was such a ruling unnecessary to resolve this matter, Special Master Dolan made no such ruling.^{3/} Instead, he repeatedly recognized that he lacked jurisdiction to address the contracts. *Order Granting Motions for Summary Judgment* at 12 ("Any claim for non-compliance under the Contracts is a matter for the Court of Federal Claims."); *Order on Motion to Alter or Amend* at 6 ("The Surface Water Coalition's remedy for breach of the Palisades Contracts is a matter for the Court of Federal Claims, not the SRBA Court.").

Further, even if Special Master Dolan had made such a ruling, it would not be grounds for this Court to reconsider its Order on Challenge. As this Court has acknowledged, the remarks expressly recognize the Palisades Contracts and provide that the contracts are not altered, amended or modified. *Order on Challenge* at 24. And again, as this Court correctly found – and the SWC concedes – any claim that the United States has acted to breach its contracts "lies in the jurisdiction of the United States Court of Federal Claims." *Id.* (citing 28 U.S.C. § 149 1(a)(I)).

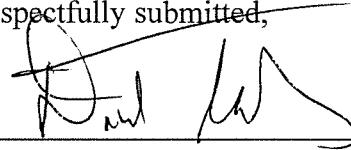
^{3/} The SWC's claim appears to rely on Special Master Dolan's statement that "[t]he remarks proposed by the State and the United States amend contracts, not elements of water rights." *Order on Motion to Alter or Amend* at 8. It appears that the Special Master inadvertently reversed the order of references. It is clear from the context, including the Special Master's previous order, that he viewed the remarks as amending the elements of the water right, not the contracts. Special Master Dolan explained that he was making the statement to reiterate the holdings of his initial *Order*. That *Order* expressly held that the remarks had no effect on the Contracts. *Order on Motions for Summary Judgment* at 13 ("The Special Master agrees with the United States' argument that the proposed remarks do not amend the Palisades Contracts which everyone agrees remain in force."). Moreover, earlier in his *Order on Motion to Amend*, the Special Master had explained that "remarks did not amend the Palisades Contracts." *Order on Motion to Alter or Amend* at 2.

Conclusion

The SWC's Motion for Reconsideration must be denied. First, it improperly raises issues not raised on *Challenge*. Second, it improperly raises issues over which this Court lacks jurisdiction. Third, it has no merit. Estoppel is only rarely available against the government and is certainly not available here. Moreover, the Motion asks this Court to reconsider a "ruling" the Special Master did not even make.

DATED this 7th day of April, 2011.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I certify that on this 7th day of April 2011, I served a true and correct copy of the foregoing THE UNITED STATES' RESPONSE TO SWC'S JOINT AMENDED MOTION FOR RECONSIDERATION as indicated below:

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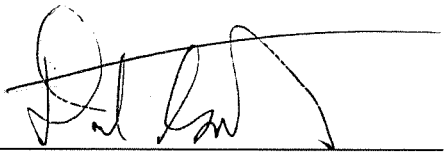
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