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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)
)
) **REPLY IN SUPPORT OF 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 (the “SWC” or “Coalition”), by and through counsel of record, and hereby submits this reply in support of the Coalition’s *Motion to Alter or Amend*.

INTRODUCTION

The issues before the Court on reconsideration are clear: (1) Is the State of Idaho bound by the *Eagle Decree* as a result of the State’s duty, through the Idaho Department of Water Resources (“IDWR”), to administer the water resources of the State? (2) Can the Bureau of Reclamation (“Bureau”) use the SRBA Decree process as a method of amending prior contracts, such that the provisions of those prior contracts would no longer have any meaning?

These issues were thoroughly briefed before the Special Master, who wrongly concluded that the State is not bound by the decrees it has historically enforced and that the Bureau can unilaterally seek a remark on a water right – even if that remark violates the contractual provisions the Bureau executed with the Coalition members.

Accordingly, the Court should reconsider its *Memorandum Decision on Challenge* as discussed below.

ARGUMENT

I. THE COALITION DID RAISE THE ARGUMENTS IN ITS MOTION FOR RECONSIDERATION BEFORE THE SPECIAL MASTER AND THE PRESIDING JUDGE.

Contrary to the Bureau’s and State’s assertions, the issues presented in the reconsideration motion have been squarely before the Court and Special Master. Indeed, the

Coalition has repeatedly asserted that the State is bound by the *Eagle Decree* due to its obligations to administer and enforce the priorities of water rights in Water District 01. Similarly, the argument that the Palisades and Minidoka Power Rights Contracts (“Palisades Contracts”) prevent the Bureau from stipulating to a separate agreement regarding its water rights that violates those contracts has been advanced by the SWC at every stage of these proceedings.¹

Whether denominated a breach of contract, an affirmative defense, a violation, barred by estoppel, or otherwise, the Coalition’s arguments have been consistently presented throughout these proceedings. Accordingly, they are properly before the Court. Accordingly, all issues should be addressed by the Court to correct the errors made by the Special Master.

II. THE STATE IS BOUND BY THE EAGLE DECREE.

The State seeks to separate itself from the *Eagle Decree*.² However, in doing so, it has ignored the very facts that bind it. Indeed, the elements of *res judicata* are clearly established in this case.³ *Ticor Title Co. v. Stanion*, 144 Idaho 119, 126 (2007) (a party must show 1. Same parties or their privies; 2. Same claim; 3. Final judgment).

First, the State, or its privy, was a party to the *Eagle Decree*. Privy is a question of fact which usually cannot be resolved summarily. *Gubler v. Hardin*, 125 Idaho 107, 110 (1994) (underlined emphasis added). Generally stated, a party is in privy with another when it “derived a direct interest in the outcome of the former litigation from the prior [party].” *Id.*

¹ See *Joint Opp. to State & U.S. Mtn for Summary Judgment*, at 24-25, 31-39, 41-49, 65-70; *Joint Opening Brief on Challenge* at 27-32, 34-35, 44-48, 68-73.

² SWC recognizes that there were actually two proceedings resulting in two, nearly identical *Eagle Decrees*, but for ease of reference, continues to refer to the resulting decrees as “the *Eagle Decree*.”

³ The State confuses issue preclusion with claim preclusion, or true *res judicata*.

Here, the State-appointed watermaster, Henry Eagle, participated in the *Eagle Decree* proceedings, which resulted in a determination of the elements, including diversion rate and priority date, of certain water rights in the Snake River basin.⁴ Mr. Eagle appeared in the proceeding in his capacity as watermaster and was represented by the Attorney General for the State of Idaho.⁵ *See* Ex. M to *Thompson Aff.* The resulting decree provided the State with greater certainty in the administration of water rights in Water District 01 – a benefit enjoyed by the State, through IDWR and its Director, since that time.⁶

The State claims that “nothing” authorized the watermaster to appear on behalf of the State in its sovereign capacity or to otherwise bind the State. *State Resp.* at 4. Yet, section § 42-1405, as it existed at that time, *required* the water users to bring the action against the watermaster, or if none, then against the Department of Reclamation; i.e. today’s IDWR. *Memorandum Decision and Order on Challenge*, Ex A at 3. This statute expressly demonstrates the intent to establish the watermaster as an agent of the Department of Reclamation, an agency of the State of Idaho.

⁴ The State attempts to bolster its argument by referring to the proceedings in water right 01-10509. *State Resp.* at 7-8. According to the State, the fact that this right was decreed even though it was not identified in the *Eagle Decree* proves the Coalition’s motion should be denied. *Id.* To the contrary, this fact says nothing about whether or not the State is bound by the *Eagle Decree*. As discussed herein, however, the State is bound. Moreover, the State of Idaho stipulated to water right 01-10509. *See* Standard Form 5 executed February 23, 2009. Accordingly, that subcase provides no support for its current argument. In addition, under the State’s reasoning Reclamation’s “beneficial use” claims at Minidoka Dam should be similarly barred since they were not claimed in the *Eagle Decree* proceedings.

⁵ The State attempts to draw a distinction between the State and IDWR by citing to Civil Rule 4(d)(4), as it was drafted at the time of the *Eagle Decree*, and Idaho Code § 42-1401C. *State Resp.* at 4-5. Yet, those statutes simply confirm that the Idaho Attorney General’s office represents the State and its agencies. Those sections do not justify the conclusion that the State, which has derived a benefit from, and enforced, the *Eagle Decree* since its inception is not bound by that judicial decree.

⁶ Furthermore, the State has never explained how the watermaster and IDWR can be bound, without also binding the State of Idaho.

The Idaho Supreme Court provided guidance on this exact issue in terms of whether a watermaster is afforded State immunity in a tort suit. In *Marty v. State*, the Court addressed the issue of whether or not “the water district and its water master and chairman agents or employees of the state or IDWR?” 117 Idaho 133, 138 (1989). The answer is “yes”.

The statutory relationship between the districts and IDWR and the directions given to the districts by IDWR ... indicate to us that ... the water district, its chairman and the watermaster were agents of IDWR.

Id. at 140.

Finally, when asked in a different context, it is the State of Idaho Attorney General’s opinion that:

Water District 01 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.

Attorney General Opinion No. 91-7 (Emphasis added).⁷

The State cannot so lightly avoid its connection to a watermaster. It is the State who appointed the Water District 01 watermaster and it is the State who has enjoyed the benefits of the *Eagle Decree*’s determination of the elements of the water rights determined therein.⁸

Second, the same claim was at issue in the *Eagle Decree*. The courts have defined “claim” in this context broadly, encompassing every matter which might have been litigated in the first suit. *Ticor Title Co.*, 144 Idaho at 126. As such, *res judicata* extinguishes all claims

⁷ While this opinion was attached to the now stricken *Affidavit of Travis L. Thompson*, it stands alone as persuasive authority.

⁸ If the State is not bound by the *Eagle Decree*, it is unclear what authority the State has had to enforce the provisions of that decree.

arising out of the same transaction or series of transactions. Here, Reclamation's power water rights were confirmed in the *Eagle Decree*. These rights were previously decreed and were subject to the Palisades Contracts, which included a specific subordination provision. Any claim that the subordination provision on these water rights should have been more broadly worded should have been addressed in prior proceedings.

Finally, the *Eagle Decree* proceedings resulted in a final judgment. *See Affidavit of David I. Stanish in Support of State of Idaho's Motion for Partial Summary Judgment*; Exs. E & F. Surprising, however, the State argues otherwise. *State Resp.* at 6-8. Yet, nothing in the State's *Response* justifies overlooking the final judgments. The State's reliance on *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736 (1997), is misplaced. *Id.* In that decision, the Court held that the Director was not bound by a prior decree where there was evidence of forfeiture or abandonment. There is no such claim or evidence here. That case does not address the binding effect of a prior decree on a state watermaster and its effect in the SRBA. In addition, unlike the facts in *Hagerman Water Right Owners*, here the State and Bureau seek a remark that expands the subordination agreed to in the Palisades Contracts and confirmed in the *Eagle Decree*. Although the State's watermaster was bound to administer Reclamation's rights pursuant to the *Eagle Decree* and its terms, the State now believes it can agree to something different in the SRBA.⁹

Accordingly, the State is bound by the *Eagle Decree* and the Court should reconsider its decision to the contrary.

⁹ The varying interpretations of the agreed to remark by the State's witnesses and the current watermaster and Director demonstrate the obvious confusion and ambiguity that the new remarks have created. *See Challenge Opening Br.* at 48-53 (discussing discrepancies in the interpretation of proposed remark).

III. THE PALISADES CONTRACTS BAR THE BUREAU FROM TAKING A CONTRARY POSITION IN THE SRBA.

In the Palisades Contracts, the Bureau took a position by agreeing to subordination language that specifically references irrigation storage rights. In this case, the Bureau is taking a contrary position by seeking to expand that language to subordinate the power rights to all water that is storable – regardless of use. Such a position either violates those contracts or creates a genuine issue of material fact as to whether or not the contracts are violated. It is this theory of estoppel that allows the contracts to operate as an affirmative defense. *In Re Gafford*, 127 Idaho, 472, 477 (1995); *Boesiger v. Freer*, 85 Idaho 551, 559 (1963).¹⁰

The Bureau contends that it has not taken inconsistent positions. *Bureau Resp.* at 4. Yet, the plain language of the contract language as compared to the proposed remark show otherwise. Indeed, the Bureau’s repeated assurance that the remarks are consistent is contradicted by its refusal to consider placing “irrigation storage” back into the subordination provision. That there remain unanswered questions is evidenced by the fact that the State’s own witnesses don’t know what their proposed remarks mean. *See Supra*, n.1; *Challenge Opening Br.* at 48-53 (discussing discrepancies in the interpretation of proposed remark). Even though the subordination language in the contracts is clear, the State blithely characterizes these changes as “irrelevant.” *State Resp.* at 11. Yet, the implications of the altered language are severe, and the Court should not treat them so casually.

It is not true, as the Bureau contends, that this Court is void of jurisdiction to hear this issue. This Court can determine whether, in light of the Palisades Contracts, the expansive

¹⁰ The State asserts that the Coalition’s must show that the Bureau agreed to include the exact language of the Palisades Contracts into its water right decrees. *State Resp.* at 9. This is incorrect.

subordination language is appropriate and whether the Bureau can advocate language contrary to the contracts. To the contrary, the Bureau has admitted that this Court has jurisdiction in the resolution of the 1923 contract issue with Idaho Power Company. Allowing the Bureau to take such actions will prejudice the Coalition – both here and in any future actions in the Federal Court of Claims.

Based on the changed language, and the confusion over its meaning, the Court erred in affirming the remark.

IV. THE STATE IS NOT ENTITLED TO COSTS AND ATTORNEY’S FEES.

Once again, the State seeks costs and attorney’s fees pursuant to I.C. § 12-121. Even if it were the prevailing party on this reconsideration motion, the State’s request should be denied.

Civil Rule 54(e)(1) provides that reasonable attorney fees may be awarded to the prevailing party when provided for by any statute or contract. Costs are allowed to the prevailing party as a matter of right. Civil Rule 54(d)(1)(A). In determining the prevailing party, the trial court must consider the final judgment or results of the action in relation to the relief sought by the respective parties. *Id.* at 54(d)(1)(B).

The Court may only award reasonable attorney fees pursuant to I.C. § 12-121 when it finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. Civil Rules 54(e)(1); I.C. § 12-121. When determining whether the action was brought or defended frivolously, unreasonably, or without foundation, the entire course of litigation must be taken into account. Where there are legitimate, triable issues, attorney’s fees may not be awarded under section 12-121, even if the losing party asserted factual or legal

claims that are frivolous, unreasonable, or without foundation. *Lieurance-Ross v. Ross*, 142 Idaho 536, 539 (Ct. App. 2006).

An award of attorneys' fees and costs is not warranted here. First, this case has turned on an extensive factual record and numerous points of law, about which there is apparent room for disagreement.

Moreover, this case has proceeded down an unusual procedural path where IDWR issued a recommendation, which was objected to by Reclamation and the Coalition. Reclamation and the State then "settled" on new remarks and moved for summary judgment on those remarks despite facts in the record demonstrating that IDWR and Water District 01 had differing interpretations of those remarks and no supplemental Director's Reports being issued. The Coalition's arguments opposing summary judgment were well grounded in facts and law, including the express terms of a prior decree and contracts executed with Reclamation.

Since this has not been an action pursued or defended at every stage by the SWC frivolously, unreasonably, or without foundation, the State's request for costs and fees should be denied.

CONCLUSION

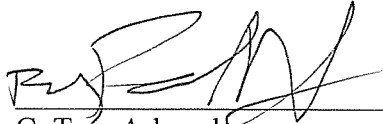
The State is bound by the *Eagle Decree* – which it has enforced, through the IDWR and its Director, for over 50-years. Likewise, the Bureau cannot take a position in the SRBA that is contrary to its contractual obligations. Accordingly, the Court should reconsider its *Memorandum Decisoin & Order on Challenge*.

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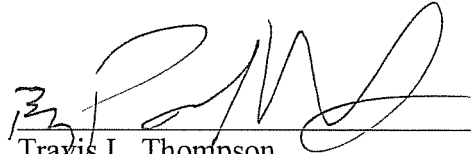
DATED this 14th day of April, 2011.

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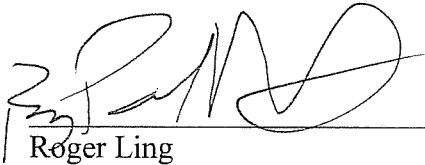
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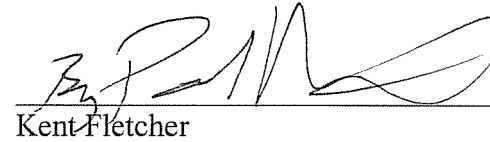


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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 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:

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