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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.: 01-02064, <i>et al.</i> (American
	)	Falls Subcases); 01-02068, <i>et al.</i> (Palisades
Case No. 39576	)	Subcases) See Attachment A.
	)	
	)	THE UNITED STATES'
	)	RESPONSE IN PARTIAL
	)	OPPOSITION TO THE
	)	STATE OF IDAHO'S MOTION
	)	FOR PARTIAL SUMMARY
	)	JUDGMENT

The State's Motion for Partial Summary Judgment seeks partial summary judgment on three counts:

- (1) *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) is "controlling authority for purposes of determining the ownership interest the City of Pocatello may have in storage water right no. 01-2068 (Palisades Reservoir)";
- (2) the partial decrees for water rights 01-2064 (American Falls Reservoir) and 01-2068 (Palisades Reservoir) should not include any reference to the *Eagle*

decrees; and

(3) the water rights for American Falls and Palisades Reservoirs should have a remark providing: “This right is filled for a given irrigation season when the total quantity of water that has accumulated to storage under this right equals the decreed quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.”

State Motion at 2.

The State’s first two requests are directed at issues for which there is little ground for dispute because they have been clearly addressed by controlling authority. The Idaho Supreme Court’s decision in *United States v. Pioneer Irr. Dist.*, 157 P.3d 600 (Idaho 2007) (“*Pioneer*”) addressed the relative ownership interest in Reclamation’s storage water rights of Reclamation and its contractors.¹ By affirming Reclamation’s title to the storage water rights, the court precluded contractor claims to an independent storage water to the same supply, such as Pocatello’s claims in Subcase 01-2068Y. Further, because the decision squarely addressed the ownership interests in the United States’s storage water rights for Reclamation reservoirs, there can be no question that the State is correct in asserting that *Pioneer* provides “controlling authority for purposes of determining the ownership interest the City of Pocatello may have in storage water right no. 01-2068 (Palisades Reservoir).” How that authority applies to Pocatello will have to be determined in subsequent proceedings.

The State’s second request travels similarly well-plowed ground. As the State points out, the Presiding Judge has recognized that the Eagle Decrees neither adjudicated any water rights, nor any administrative provisions. Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment (Feb. 21, 2012) (“Mem. in Support”) at 13 (citing *Order on*

¹ Moreover, during the *Pioneer* proceedings, then-Presiding Judge Melanson expressly affirmed IDWR’s disallowal of the competing claims filed by the irrigation entities. That aspect of his decision was not appealed.

Motion to Alter or Amend at 5). Even if that were not the case, the United States was not a party to the Eagle Decrees and the storage rights at issue in this proceeding were not addressed in the *Eagle* proceedings. For both these reasons the Eagle Decrees can provide no meaningful guidance regarding the storage water rights addressed by the State's Motion. Accordingly, the State is correct in asserting that a general reference to the Eagle Decrees cannot be necessary to define, clarify or administer the storage water rights.²

In contrast to its first two requests, the State's third request is directed at an issue which has yet to be addressed by the judiciary. Instead, the State is attempting to use summary proceedings to impose a remark upon the United States' American Falls and Palisades storage rights which would decree a portion of the complex system used for administration and accounting of those water rights. The United States opposes the remark proposed by the State on several grounds: the remark is not clear on its face; it lacks adequate legal foundation and it has the potential to penalize Reclamation when operational mandates require it to pass water rather than store it.

The remark fails to provide clarity and therefore is inconsistent I.C. § 42-1411(2)(j) because its plain language leaves doubt as to when water will be considered to have "accumulated to storage." The State's brief implies that all water passing through a reservoir in priority will be considered to have "accumulated to storage" – whether or not the water is actually stored. If that is the State's intent, the remark must be rejected because it has an inadequate legal foundation.

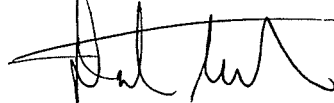
There is no question that a water right holder has some discretion in deciding how

² Although the Eagle Decrees did not adjudicate any water rights, they did ratify the Palisades Contracts and incorporated some of the provisions of those contracts. Memorandum Decision and Order on Challenge at 10-11 (Feb. 9, 2011). Like the State, the United States is not intending to rule out the possibility that some provision(s) of the Palisades Contracts may be appropriate for a remark.

to exercise its water rights. Indeed, such discretion is a necessary corollary to the well recognized principle that there is an obligation not to waste water. *See American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007). The State's proposed remark, however, effectively penalizes Reclamation for the exercise of that discretion by counting all water that passes through a reservoir when the reservoir is in priority as stored water, even if operational considerations require Reclamation to pass the water.³ The State cites no legal authority, nor is the United States aware of any, holding that all water entering a reservoir must be considered to have been stored for water right accounting purposes, regardless of whether it is actually stored or not. Instead, the State relies on historic practices, which it concedes have been handled "in several different ways over the years." Mem. in Support at 40. Even if that were not the case, a historic practice standing alone is inadequate to support a remark. *See Id.* at 37 ("Historical practices' alone are insufficient to support . . . a remark").

DATED this 16th day of April, 2012

Respectfully submitted,



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³ Reclamation is also concerned that the proposed remark could conceivably deprive the Director of flexibility that may be needed to respond to changed circumstances. As a worst case, the remark could lead to a conflict between Reclamation's federally mandated obligations such as flood control and power generation, and the State regulatory system. *Cf. United States v. California*, 438 U.S. 645, 672-74 (1978).

CERTIFICATE OF MAILING

I certify that on April 16, 2012, I served true and correct copies of the foregoing
THE UNITED STATES' RESPONSE IN PARTIAL OPPOSITION TO THE STATE OF
IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT as follows:

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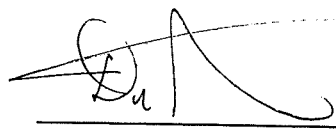
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Attachment A

American Falls Subcases

01-02064
01-02064A
01-02064B
01-02064C
01-02064D
01-02064E
01-02064F
01-02064L
01-10042
01-10042A
01-10042B
01-10053A
01-10190

Palisades Subcases

01-02068
01-02068D
01-02068E
01-02068F
01-02068M
01-02068Y
01-10043
01-10043A
01-10043E
01-10191
01-10389