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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> &
	)	01-02068, <i>et al.</i> (See Attachment A)
Case No. 39576	)	
	)	UNITED STATES' RESPONSE TO
	)	SWC'S MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT

Introduction

The Surface Water Coalition's ("SWC") Joint Motion for Partial Summary

Judgment seeks remarks intended to correspond to provisions of the Palisades Contracts

addressing the following areas:

- (1) An agreement which created senior storage priority in American Falls and Palisades Reservoirs ("Winter Water Savings")
- (2) An exchange of storage held by the North Side Canal Company ("NSCC") and the Burley Irrigation District ("BID") in Jackson Lake with storage held by upper valley interests in American Falls Reservoir ("Permanent Exchange").

- (3) The ability to temporarily hold storage water in upstream reservoirs (“Temporary Upstream Storage”).
- (4) An exchange and other provisions specific to the Minidoka Irrigation District (“MID Exchange”).
- (5) Provisions relating to a Memorandum of Agreement between Reclamation and the Bureau of Indian Affairs regarding the Michaud Project (“Michaud Agreement”).

See MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT at 4

(“SWC Mem.”).

The SWC asks this Court to adopt a single remark which references sample provisions of the Palisades contracts that were attached as exhibits to the *Eagle Decrees*. SWC Mem. at 19. Alternatively, the SWC seeks a remark that refers to “procedures described in the [Palisades Contracts]” and incorporates an Exhibit providing text excerpted from a Palisades Contract. *Id.* at 20. Thus, both of the remarks proposed by the SWC effectively seek to incorporate excerpts from the text of a Palisades Contract into the decree.¹

The SWC’s memorandum also suggests that a third approach—adoption of the Director’s proposed remarks—could be acceptable to the SWC as a last resort. *See id.* (arguing that “at a minimum” the Court should decree the Director’s remark). The Director’s Reports included remarks specifically addressing Temporary Upstream Storage and Winter Water Savings. The Director’s third remark noted that delivery of water under the water right may be subject to procedures described in the Palisades Contracts, but did not identify those procedures. *See* SWC Mem. at 11 (setting out the text of the Director’s remarks) and Affidavit of Paul Arrington, Exs. G & H (the Director’s Reports). Although the Director’s remark for Temporary

¹ Although the SWC offers proposed remarks addressing Winter Water Savings, the SWC would prefer this Court to adopt the Winter Water Savings remark stipulated to by all parties except Pocatello. SWC Mem. at 14 (citing STIPULATION TO RESOLVE CERTAIN OBJECTIONS (Jan. 26, 2012)). The stipulated remarks do not incorporate lengthy excerpts from the Palisades Contracts.

Upstream Storage largely tracks language appearing in the Palisades Contracts, the Director's proposed remark differs from that of the SWC because it does not expressly incorporate contract language.

Below the United States demonstrates that the SWC's proposed remarks must be rejected. Instead, the Court should adopt the stipulated language for Winter Water Savings and the Director's remark for Temporary Upstream Storage. Further, because both the remarks proposed by the SWC and those proposed by the Director to address the Permanent and MID Exchanges do not meet the statutory requirements, the court should adopt remarks the United States proposes below to address those two areas. Finally, because the Michaud Agreement is already the subject of an SRBA decree and a federal statute, there is no need for a remark.

Argument

I. STANDARD OF REVIEW

Summary judgment is appropriate if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497, 498, 112 P.3d 785, 787 (2005). Because this action is being tried before the Court without a jury, this Court is entitled to draw the most probable inferences from the undisputed evidence properly before it and grant summary judgment in spite of the potential for conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrev. Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007); *see also Read*, 141 Idaho at 499, 112 P.3d at 787. In the context of this proceeding, that standard allows this Court to resolve any factual issues concerning the proposed remarks.

An explanatory remark is appropriate only when it is “necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the

director.” I.C. § 42-1411(2)(j). Whether a proposed remark meets that statutory standard is a question of law which can be decided on summary judgment. *See A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568, 571 (1997).

II. THE REMARKS PROPOSED BY THE SWC SHOULD BE REJECTED.

A. The Remarks Proposed by the SWC Fail to Meet the Statutory Standard.

As noted above, both the remarks proposed by the SWC effectively seek to incorporate excerpts from a Palisades contract into remarks. Thus both remarks share a fundamental problem: no excerpt from a single contract can accurately capture the requirements of all of the contracts. This is particularly a problem for a remark addressing the Permanent Exchange. That exchange involves more than twenty spaceholders. Each has a contract with unique language intended to describe the particulars of that spaceholder’s participation in the exchange.² Because the exchange cannot be accurately administered without reference to all of those contracts, reference to the terms of a single contract fails to aid in the administration of the water rights.

A further problem underlying both remarks is that the contract excerpts are written in dense, somewhat archaic, language and include specific details that are unique to the particular contract the excerpt is taken from; references to other aspects of the contract that are unclear; and extensive material that is not necessary to administer these water rights.³

Consequently, the contract excerpts fail to provide clarity.

² Further, the SWC seeks to incorporate the exchange provisions of the North Side Canal Company’s original contract which contemplated that up to 335,810 acre-feet of water would be exchanged. That contract was amended in 1960 when the Minidoka Irrigation District refused to participate in the exchange. MID’s refusal left only 149,780 acre-feet of water subject to the exchange. *See* Contract 14-06-W-28 at 4 (Exhibit 1 to the Affidavit of David A. Jarvis).

³ As an example, the provisions of the Michaud Agreement excerpted in the Eagle Decree identify lands which are ineligible to benefit from the Agreement; require the use of “the so-

A more general reference to the contract requirements, such as those proposed by the United States below, avoids that problem. Further, it allows for the possibility that the contract provisions may change over time. Avoiding express incorporation of contract language, also avoids any possible implication that the Director and/or a State court can grant relief under the contract.⁴

B. Any Remark Adopted Cannot Include a Reference to the Eagle Decree.

The first remark proposed by the SWC suffers from an additional flaw: it unnecessarily refers to the Eagle Decrees. The SWC asserts that the remark does so merely to provide a “point of reference.” SWC Mem. at 19. The SWC does not explain why this “point of reference” would aid in the administration of the water rights or is otherwise a necessary part of a remark. Regardless, no reference to the Eagle Decree is necessary or appropriate.

The SWC relies on the Eagle Decree as a means to convince this Court that certain parties are bound to the Palisades Contract provisions incorporated therein.⁵ SWC Mem.

called Newell formula,” the specifics of which have been lost to the passage of time; and place limits on the Bureau of Indian Affairs’ ability to claim return flows from the Michaud Division of the Fort Hall Indian Irrigation Project and groundwater. *See* Continued Deposition of Anthony Olenichak dated Mar. 21, 2012 at 226:13-27:12 (attached as Ex. 41 to Affidavit of Travis L. Thompson dated Apr. 16, 2012) (“Olenichak Depo.”) (noting that he did not know how to calculate the Newell formula because it has not been used since 1978).

⁴ As this Court has repeatedly recognized, only federal courts can provide such relief. *See e.g.*, ORDER ON MOTIONS FOR SUMMARY JUDGMENT. . . Subcase 01-2064 (Mar. 31, 2011) at 21 (“The SRBA Court, a court of limited jurisdiction, adjudicates elements of water rights while a claim of non-compliance under a federal contract with the United States is a matter for the Court of Federal Claims.”).

⁵ The SWC’s Memorandum includes arguments addressing the purported binding affect of the Eagle Decree on certain parties to this proceeding and on junior appropriators. The United States does not address those arguments because regardless of whether other parties may be bound by the Eagle Decrees, the United States was not a party to those decrees, could not have been a party and is not bound by them. MEMORANDUM DECISION AND ORDER ON CHALLENGE, Subcase Nos. 01-217, *et al.* at 13 (Feb. 9, 2011); MEMORANDUM DECISION AND ORDER ON MOTION TO ALTER OR AMEND JUDGMENT, Subcase Nos. 01-217, *et al.* at 4 (May 17, 2011).

at 21-23. That may be, but adding a gratuitous reference to the Eagle Decree in a remark does not aid in the administration of the water right. Nor do all parties to the SRBA need to be bound to the contracts in order for the contracts to remain effective. Further, instead of providing clarity, a reference to the Eagle Decree on the face of a water right belonging to the United States creates potential confusion by implying the United States is bound by the Eagle Decrees. As this Court is well aware, the United States is not bound by the Eagle Decrees.

III. THE COURT SHOULD ADOPT THE WINTER WATER SAVINGS REMARK STIPULATED TO BY ALL PARTIES EXCEPT POCATELLO.

All parties except the City of Pocatello have stipulated to a remark addressing Winter Water Savings. *See* STIPULATION TO RESOLVE CERTAIN OBJECTIONS (Jan. 26, 2012). A Winter Water Savings remark is necessary to identify the portion of the storage water right that is entitled to a senior priority. The stipulated remark is simple, concise and provides exactly the information needed to allow administration of the water rights consistent with the winter water savings provisions of the Palisades Contracts. It improves upon the Director's proposed remark by providing specificity, and therefore clarity, lacking in the Director's remark. It also avoids the pitfalls of the SWC's proposed remarks because it does not incorporate lengthy passages of the contracts. In fact, the SWC has signed the stipulation and supports the Court adopting it. SWC Mem. at 14 & 21 n.14.

Pocatello has never articulated an objection to the proposed Winter Water Savings remark. *Cf.* POCATELLO'S RESPONSE TO STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT at 4-5 & n.4 (articulating Pocatello's objection to the *Pioneer* remark portion of the Stipulation). Regardless of what Pocatello may say, the stipulated remark clearly meets the statutory standard, is superior to the other proposed Winter Water Savings remarks and therefore should be adopted.

IV. THE COURT SHOULD ADOPT THE TEMPORARY UPSTREAM STORAGE REMARK PROPOSED BY THE DIRECTOR.

The temporary storage of water in upstream reservoirs has been a central part of the operation of the Upper Snake reservoir system at least since the construction of Palisades Reservoir. Tony Olenichak testified that temporary upstream storage is necessary for efficient operation of the system and allows Reclamation to maximize its storage of water above Milner Dam. Olenichak Depo. at 201:10-15 and 230:17-21. A remark recognizing Reclamation's ability to temporarily store water in upstream reservoirs is appropriate because it would aid in the administration of the water rights by providing express authority for this long standing, highly beneficial practice.

The Director's proposed Temporary Upstream Storage remark largely tracks the relevant provision of the Palisades Contracts. Still, it improves upon the straight incorporation of the contract provision proposed by the SWC by more accurately identifying the parties involved in deciding when temporary upstream storage is appropriate and making explicit the contract's implicit acknowledgment of Reclamation's participation in that process. In light of those benefits, the Court should adopt the Director's proposed Temporary Upstream Storage remark rather than that proposed by the SWC.

V. THE COURT SHOULD ADOPT THE EXCHANGE REMARKS PROPOSED BY THE UNITED STATES.

In contrast to the winter water savings and upstream storage provisions, the two exchanges that the SWC seeks to endorse through a remark have not been a consistent part of the administration of these water rights. In fact, Mr. Olenichak testified that neither has been accounted for since IDWR implemented computerized accounting in 1978. *See* Olenichak Depo. at 216:16-218:24 (Mr. Olenichak has no knowledge of the permanent exchange credit being

implemented); 312:16-21 (MID Exchange has never been part of accounting program). While these provisions are not a part of the Water District's current accounting program, the exchanges are appropriately the subject of a remark because they potentially affect administration of the water right.⁶ See SWC Mem. at 15.

The Director did not propose a remark specifically addressing the Permanent and MID Exchanges. Although the Director's remark generally referring to unidentified provisions of the Palisades Contract presumably incorporates the contract provisions addressing those two exchanges, the Director's remark fails the test of clarity. By not identifying specific provisions of the contracts, it opens the door to confusion and argument over which contract provisions administration of the water rights is subject to.

By specifically identifying contract provisions, the SWC's proposed remarks take a step toward clarity, but they also introduce other problems. In addition the general problems with contract incorporation discussed above, the SWC's proposed remarks are unwieldy. The Permanent Exchange provisions span more than a page. The MID Exchange provisions are even longer – roughly two full pages of text – and contain provisions that are not necessary to the administration of the water right. Moreover, as noted above, operation of the Permanent Exchange requires information from the contracts of more than 20 different parties. No excerpt from a single contract can accurately describe the exchange.

⁶ Indeed, in some contexts, an exchange can be the subject of an appropriative right. See e.g., *Centennial Water and Sanitation Dist. v. City and County of Broomfield*, 256 P.3d 677, 683-84 (Colo. 2011).

In light of the problems inherent in both the Director's and the SWC's proposed remarks, the United States asks the Court to adopt the following remarks to address the Permanent and MID Exchanges:⁷

Permanent Exchange (water right 01-2064 only)

The spaceholder contracts between the United States Bureau of Reclamation (USBR) and Burley Irrigation District and North Side Canal Company, respectively, provide for a credit of storage from Jackson Lake reservoir under water rights 01-4055, 01-10044, and 01-10045 to space in American Falls reservoir under water right 01-2064 upon certain conditions. This determination and calculation of credit, if any, shall be made pursuant to contracts entered into with the USBR for space in American Falls and Jackson Lake reservoirs.

MID Exchange (both 01-2064 and 01-2068)

Minidoka Irrigation District has the right to make annual exchanges of storage and to designate reservoirs for purposes of delivery and carryover of storage, as described in contract no. 14-06-100-1833 entered into with the United States Bureau of Reclamation.

These proposed remarks take the same approach as those decreed in the water right for Lucky Peak Reservoir in Basin 63 (water right 63-03618). Like those remarks, the United States' proposed remarks provide notice that there are contract provisions affecting administration of the water rights, but leave the specifics of what is to be done to the contracts. That approach avoids burdening the remarks with excess material, allows for the possibility that the contract provisions may change and avoids the implication that the Director and/or a State court can grant relief under the contract. Thus the remarks provide guidance in administering the water rights while striking an appropriate balance between the lack of clarity in the Director's

⁷ The United States has not filed a cross motion seeking adoption of the remarks it is proposing because to do so would likely upset the briefing and argument schedule already adopted. To maintain that schedule, the United States has no objection to parties addressing the United States' proposed remarks in a reply brief. In any event, a cross-motion is not necessary for this Court to adopt the proposed remarks on summary judgment. *See KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 527, 236 P.3d 1284, 1287 n.5 (2010) (a motion for summary judgment allows the trial court to rule on all issues placed before it in conjunction with the motion; a motion is not required for a party to obtain summary judgment); *see also, Kassaum v. Steppenwolf Productions, Inc.*, 236 F.3d 487, 494 (9th Cir. 2000).

reference to unidentified “procedures” and the excess of the SWC’s proposal to adopt pages and pages of dense contract language as the remark.

VI. NO REMARK IS NECESSARY OR APPROPRIATE FOR THE MICHAUD AGREEMENT.

The SWC’s proposed remark addressing the use of water by the Michaud Division of the Fort Hall Indian Reservation stands on an entirely different footing than its other proposed remarks. The remark does not seek to give effect to the Palisades Contracts. Rather it is derived from a 1957 Memorandum of Agreement between Reclamation and the Bureau of Indian Affairs. That Agreement calls for storage water credits to be applied when the Michaud Division uses ground or surface water that would have otherwise flowed into American Falls Reservoir, subject to exceptions for the use of certain flood waters, and 22,400 acre-feet of groundwater, calculated on a 10 year rolling basis. MEMORANDUM OF AGREEMENT BETWEEN THE BUREAU OF RECLAMATION AND THE BUREAU OF INDIAN AFFAIRS RELATING TO WATER SUPPLY FOR MICHAUD DIVISION OF THE FORT HALL INDIAN RESERVATION, IDAHO (April 25, 1957) at 20-21 (“Michaud Agreement”) (Affidavit of Paul L. Arrington dated Apr. 19, 2012 at Ex. E).

Tony Olenichak testified that Water District 1 accounts for use of surface water by the Michaud Division, but has not administered the groundwater aspects of the Michaud Agreement.⁸ *See* Olenichak Depo. at 222:9-223:18. At the time of the Michaud Agreement, important aspects of the groundwater rights used by the Michaud Division had yet to be defined. Clarification came through the 1990 Fort Hall Agreement, and subsequent decree, which defined the groundwater use by the Michaud Division as a Tribal water right with an 1867 priority. *See*

⁸ Although Mr. Olenichak did not discuss the details, in a typical year roughly 35,000 acre-feet of surface water is used and credited from the Tribes’ Palisades storage rights.

Subcase 00-92022 Partial Final Consent Decree at 35, Water Right 27-11376. Moreover, while in 1957 it may have been contemplated that ground water use would be extensive, today the Michaud Division receives ground water from nine wells and only on a supplemental basis. *See id.* at 38. Those wells typically pump only a few thousand acre-feet of water in the aggregate.

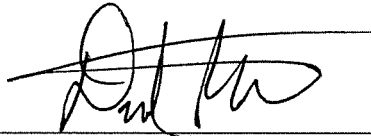
In any event, there is no need for remark addressing the Michaud Agreement because it has already been addressed by the 1990 Fort Hall Agreement, which in turn is the subject of both a decree in the SRBA and a federal statute. In the Fort Hall Agreement, the Secretary of Interior and the Shoshone-Bannock Tribes “agree[d] to continue *to exchange storage water* [held by the U.S. in trust for the Michaud Division of the Fort Hall Indian Irrigation Project] *for water diverted from the Portneuf River* as provided for in Article 8 of the [Michaud Agreement].” 1990 Fort Hall Agreement at ¶¶ 7.3.1 – 7.3.3 (pertinent pages attached as Exhibit 2 to the Jarvis Affidavit). Thus, the Fort Hall Agreement recognizes that the Michaud Division’s use of water from the Portneuf River will continue to be compensated for by an exchange of storage water. *See also* Pub. L. 101-602, § 4104 Stat. 3059, 3060 (ratifying the Fort Hall Agreement).

Likewise, the Fort Hall partial final consent decree recognizes that the Michaud Agreement applies to the administration of the tribal and Bureau of Indian Affairs’ water stored in Palisades and American Falls Reservoir. *See* Partial Final Consent Decree, subcase 00-92022 at 71-72 (Aug. 2, 1995). With the Fort Hall Agreement, a federal statute and an SRBA decree already recognizing the application of the Michaud Agreement, there is no need for a remark on this water right to do so.

Conclusion

For the reasons explained above, the United State respectfully requests that this Court deny the SWC's motion for partial summary judgment and instead adopt (1) the Winter Water Savings remark stipulated to by all parties except Pocatello; (2) the Director's proposed remark for Temporary Upstream Storage; and (3) the remarks proposed by the United States for the Permanent Exchange and the MID Exchange.

DATED this 7th day of June, 2012.

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

David W. Gehlert
Attorney for the United States

CERTIFICATE OF SERVICE

I certify that on June 7, 2012, I served true and correct copies of the foregoing UNITED STATES' RESPONSE TO SWC'S MOTION FOR PARTIAL SUMMARY JUDGMENT as follows:

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A handwritten signature in black ink, appearing to read 'D. Gehlert', with a long horizontal flourish extending to the right.

David W. Gehlert

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