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DEPARTMENT OF
WATER RESOURCES

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. Attachment A

**SURFACE WATER
COALITION'S REPLY BRIEF IN
SUPPORT OF JOINT MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal

Company and Twin Falls Canal Company, (hereinafter collectively referred to as the “Surface Water Coalition” or “SWC”), by and through their undersigned counsel of record, and hereby submit this *Reply Brief* in support of the joint motion for partial summary judgment filed on April 19, 2012. The Coalition’s reply addresses the responses filed by the United States Bureau of Reclamation (“Reclamation”), the State of Idaho (“State”), the Ground Water Districts (“GWD”), and Fremont-Madison Irrigation District et al.

INTRODUCTION

The Coalition agrees with Reclamation’s proposed alternative remarks for the administration of the Temporary Upstream, Permanent, and Minidoka Irrigation District storage exchanges. Although IDWR’s recommended remark addressing the Palisades Contracts and *Eagle Decree* may already provide the necessary reference to these provisions,¹ Reclamation’s proposed alternatives are more precise for purposes of future administration. In other words, Reclamation’s remarks are preferred to the general remark recommended by IDWR.² These remarks are recognized by IDWR, Water District 01, Reclamation, and the Coalition as necessary for administration of the American Falls and Palisades storage water rights. Although the State of Idaho, the Ground Water Districts, and a few upper valley spaceholders oppose the Coalition’s motion on certain issues, none of those parties have provided any facts to create a genuine issue of material fact. Moreover, none of the Respondents have provided any legal basis to dispute that the remarks are necessary for administration of the storage water rights.

¹ Tony Olenichak, Assistant Watermaster and Program Manager for Water District 01, testified that IDWR’s current remarks in its recommendations already address, or could cover the substance of the remarks proposed by the Coalition in its *Motion for Partial Summary Judgment*. See Olenichak Depo. Tr. Vol. II, p. 207, lns. 12-15; p. 212, lns. 1-7; p. 215, lns. 16-25; p. 216, ln. 1-4; p. 221, lns. 9-25; p. 222, lns. 1-3; p. 228, lns. 13-20; *Thompson Aff.*, Ex. 41.

² The Coalition has identified one minor change that should be made to the Temporary Upstream Storage Remark. See Part I.A.

In sum, since the real parties in interest³ to these storage water rights agree to these proposed remarks, and they are necessary for purposes of administration, the Special Master should grant summary judgment and recommend the proposed remarks set forth below as a matter of law.

ARGUMENT

I. The Coalition Agrees the Court Should Adopt Reclamation's Alternative Remarks.

The Coalition moved for partial summary judgment on several administrative provisions set forth in the Palisades Contracts that were later ratified and confirmed in the *Eagle Decree*. See *SWC Motion for Partial Summary Judgment* at 1-2. The Coalition provided two options for the Special Master to consider: 1) a single reference to cover the specific administration provisions (similar to IDWR's general remark); or 2) the remarks' verbatim language set forth in the Palisades Contracts as attached to the *Eagle Decree*.

In response, Reclamation provided three alternative remarks to address the Temporary Upstream Storage, the Permanent, and the Minidoka Irrigation District exchange provisions.⁴ Reclamation's proposed changes are appropriate and provide clear and concise remarks for the storage water right partial decrees. In essence the proposed remarks refine what IDWR has already recommended. The Coalition agrees with Reclamation's proposed alternatives and addresses each one below.

³ Reclamation is the legal title holder and the Coalition consists of seven individual spaceholders that hold beneficial title to the storage water rights. See *United States v. Pioneer Irr. Dist.*, 144 Idaho 106 (2007). This case is distinguishable from the hydropower water rights litigation wherein the Court determined the Coalition entities did not hold the same beneficial use rights to those water rights as they did with regards to the irrigation storage water rights. See *Memorandum Decision and Order on Challenge* (Subcase No. 01-217 et al.) at 18-21 ("This case however is distinguishable. As an initial matter the water rights at issue here are not irrigation rights but rather hydropower rights. . . . For all practical purposes the USBOR is the consumer of the water in this case.").

⁴ The Coalition agrees to the "Winter Water Savings" remark has been resolved by stipulation of the parties filed with the Court on January 26, 2012. Furthermore, the Coalition agrees to withdraw its request regarding the BIA-Michaud Division remark for the reasons set forth in Part I.C.

A. Temporary Upstream Storage Remark

Reclamation recommends the Court adopt IDWR's "temporary upstream storage" remark instead of the language suggested in the Coalition's motion. *BOR Br.* at 7. The Ground Water Districts agree with Reclamation on this issue.⁵ *See GWD Br.* at 4-5. Although IDWR's remark attempts to capture the storage right administration provided by the language in Paragraph 19a (Ex. C to the *Eagle Decree*), there is one key difference that the Court should correct. Since the Palisades Contracts specifically identify the Water District 01 Watermaster as part of the determination, instead of IDWR, that change should be adopted to avoid any inconsistency or conflict in the future.

It is clear that Water District 01, not IDWR, has been the responsible party for administering this provision.⁶ Indeed, the Watermaster is specifically named in the Palisades Contracts as one the parties responsible for determining when water from one reservoir can be temporarily stored in unoccupied space in another upstream reservoir. *See Ex. 1 to Coalition Joint Motion for Partial Summary Judgment* ("Water in storage in any of the reservoirs of the system may, however, **when the watermaster** and the Advisory Committee determine this to be in the interest of water conservation, be held temporarily in unoccupied space in any other reservoir of the system.") (emphasis added). Although IDWR's remark correctly identifies the Water District 01 advisory committee and Reclamation, it mistakenly substitutes IDWR for the Watermaster.

⁵ Despite not objecting to IDWR's Temporary Upstream Storage remark, the State of Idaho and the three upper valley spaceholders now oppose it in response to the Coalition's motion. *See State Br.* at 52; *FMID Br.* at 1. These parties cannot create "objections" to IDWR's recommendations by way of a response brief on summary judgment. If they oppose IDWR's recommendation the parties must follow the proper SRBA procedures.

⁶ IDWR and Water District 01 are separate entities. However, the Director "supervises" the Watermaster. *See I.C. § 42-602.*

Therefore, the remark as recommended by IDWR and agreed to by Reclamation, should be slightly amended as follows:

“Place of use for irrigation storage and power storage is American Falls [Palisades in 01-2068] Reservoir, provided, however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range 21E, when determined by the ~~Department of Water Resources~~ Water District 01 Watermaster, the Water District 01 advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner Dam.”

See Director’s Report Basin 01, Part 2, Water Right Recommendations for 01-2064 and 01-2068 (proposed changes in strikethrough/underscore); Exs. F, G to *Arrington Aff.* (filed 4/19/2012).

In essence, the above changes are consistent with the Palisades Contracts and actual administration of the water rights and do not substantively alter what IDWR is recommending. The Coalition requests the Special Master to recommend the above remark under the place of use element for both the American Falls (01-2064) and Palisades (01-2068) reservoir storage water rights.

B. Permanent / Minidoka Irrigation District Exchange Remarks

Reclamation also recommends the Court adopt the following language as alternatives to the Coalition’s proposed exchange remarks:

“The spaceholder contracts between the United States Bureau of Reclamation (USBR) and Burley Irrigation District and USBR 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 rights 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.”

“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 U.S. Bureau of Reclamation.”

Reclamation recognizes that the above provisions are “appropriately the subject of a remark because they potentially affect administration of the water right.” *Reclamation Br.* at 8. Rather than include the exact language from the Palisades Contracts, or a specific reference to the *Eagle Decree* exhibits, as suggested in the Coalition’s motion, Reclamation’s alternative succinctly captures the substance of the necessary administration in a clear and concise manner. The Coalition has provided the necessary history, including the factual and legal support for these remarks in both its motion for partial summary judgment and brief in response to the State of Idaho’s motion. Accordingly, the Coalition supports Reclamation’s proposed changes and requests the Special Master to recommend the Permanent and Minidoka Irrigation District Exchange remarks for the American Falls (01-2064) reservoir storage water right.

C. BIA - Michaud Division Remark

Reclamation states that it is unnecessary to include a reference to the 1957 Memorandum of Agreement between Reclamation and the Bureau of Indian Affairs concerning the Michaud Division of the Fort Hall Indian Reservation. *Reclamation Br.* at 10. Reclamation justifies no remark on the storage water rights since the MOA between Reclamation and BIA has already been addressed by the 1990 Fort Hall Agreement filed in the SRBA. *Id.* at 10. The Fort Hall Agreement and the SRBA Court’s Partial Final Consent Decree expressly recognize the continued exchange and administration of the tribal and BIA water rights. Accordingly, the Coalition agrees it is unnecessary to add another remark on Reclamation’s storage water rights on this matter. The Coalition withdraws its request for the Court to add the Michaud Division remark through partial summary judgment.

In summary, the alternatives proposed by Reclamation accurately capture the subject of the Palisades Contracts' remarks necessary for administration of the American Falls and Palisades storage water rights. Although IDWR's recommendations already include a general reference to these provisions, the remarks set forth above are more precise and will appropriately guide the Watermaster in efficient administration of the rights.⁷ The Coalition respectfully requests the Special Master to grant the motion for summary judgment and recommend the above remarks.

II. The Respondents Have Failed to Submit Any "Facts" in Opposition to the Coalition's Motion for Partial Summary Judgment.

Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist. *Plummer v. City of Fruitland*, 140 Idaho 1, 4 (2003). The State fails to provide any "facts" whatsoever to rebut the Coalition's motion. Instead, the State only recites the procedural history and prior briefing in this case and others.⁸ This is an insufficient response to defeat summary judgment. A party against whom summary judgment is sought may not merely rest on allegations contained in its pleadings, but must come forward and produce "specific facts" to contradict the assertions of the moving party and establish a genuine issue of material fact. *McCorkle v. Nw. Mut. Life Ins. Co.*, 141 Idaho 550, 555 (Ct. App. 2005) (citing *Olsen v. J.A. Freeman Co.*, 117 Idaho 706 (1990)). Failure to do so will result in an order granting summary judgment. *Plummer*, 140 Idaho at 4.

⁷ The State of Idaho did not object to IDWR's recommended remark referencing the Palisades Contracts and *Eagle Decree*. Since the Permanent and Minidoka Irrigation District Exchange provisions are included in that general reference, the State has no basis to argue that more precise remarks should be denied now.

⁸ In addition, the State wrongly insinuates that the Coalition's motion is a "cross motion" to the State's motion. Although both parties filed motions for partial summary judgment they concern different issues in these subcases.

Substantively, the State of Idaho has nothing to offer to refute the factual history of the Palisades Contracts' remarks and the administration of those provisions. Such a response fails under the Idaho rules of civil procedure. The rule governing motions for summary judgment provides, in relevant part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

I.R.C.P. 56(e).

If the nonmoving party does not come forward with evidence as provided in Rule 56(e), then summary judgment, if appropriate, "shall be entered against the party." *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719 (1996). In *Petricevich v. Salmon River Canal Co.*, the Idaho Supreme Court explained:

Flimsy or transparent contentions, theoretical questions of fact which are not genuine, or disputes as to matters of form do not creat[e] genuine issues which will preclude summary judgment. ***Neither is a mere pleading allegation sufficient to create a genuine issue*** as against affidavits and other evidentiary materials which show the allegation to be false. A mere scintilla of evidence is not enough to create an issue; there must be evidence on which a jury might rely. A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried.

92 Idaho 865, 871 (1969) (emphasis added).

A material fact "is one upon which the outcome of the case may be different." *Johnson v. N. Idaho Coll.*, 38605, 2012 WL 1948476 (Idaho May 31, 2012) (citing *Peterson v. Romine*, 131 Idaho 537, 540 (1998)). Furthermore, "the trial court is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary

judgment is required to bring that evidence to the court's attention.” *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 919 (2008).

The requirement found in Idaho case law that a party moving for summary judgment “present evidence” is not a requirement that the party “present specific facts.” *Foster v. Traul*, 141 Idaho 890, 893 (2005). “Evidence” and “facts” are related but nonetheless different concepts. *Id.* The summary judgment process “imposes different requirements on a movant than those faced by the adverse party.”

Although the party moving for summary judgment must establish through “evidence” the absence of any genuine issue of material fact, there is no requirement the movant present specific facts. Once the movant has made and appropriately supported its motion, ***it is the responsibility of the adverse party to come forward with evidence, and to set forth specific facts showing that there is a genuine issue for trial.***

Id., (citing I.R.C.P. 56(e) (internal citations and quotations omitted)) (emphasis added).

The Coalition established there are no genuine issues of material fact that the *Eagle Decree* is binding on the parties to that proceeding and that the referenced Palisades Contract provisions are necessary for administration of the storage water rights as a matter of law. *See Coalition Br.* at 3, 21, 27. Importantly, both Reclamation and IDWR agree that remarks referencing these provisions are necessary. The Coalition incorporated its previous statement of facts in its *Joint Memorandum in Opposition to the State of Idaho’s Motion for Partial Summary Judgment*, a detailed 26 page account of the factual history and importance of the *Eagle Decree* and Palisades Contracts to the administration of storage rights and operation of the Upper Snake River Basin reservoirs. The Coalition also presented additional evidence in its *Memorandum in Support of Joint Motion for Partial Summary Judgment* and through the *Affidavit of Paul L. Arrington*.

In response, the State has failed to offer any “facts” to rebut the Coalition’s position and establish its own. Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. *Chandler v. Hayden*, 147 Idaho 765, 769 (2009). A nonmoving party must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact. *Id.*

The summary judgment standard “is applied somewhat differently in cases... where the matter is tried to the court without a jury.” *Crown v. Klein Bros.*, 121 Idaho 942, 945 (Ct. App. 1991). In *Klein Bros.* the Court of Appeals noted:

In *Ritchie* our Supreme Court held that if an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.* at 519, 650 P.2d at 661. *Blackmon v. Zufelt*, 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct. App.1985). Therefore, our task on review is to determine whether, based on the most probable inferences to be drawn from the uncontroverted facts, Klein was entitled to judgment as a matter of law on either of the grounds asserted by Klein.

Id.

In *Foster v. Traul*, the Defendants’ motions for summary judgment were supported by depositions and affidavits setting forth evidence they had complied with the applicable standard of care. Thus, “when the Defendants made a showing they had complied with the standard of care, they shifted the burden and placed in question an essential element of Foster’s case.” *Foster v. Traul*, 141 Idaho 890, 893 (2005). Because the trial court struck down Plaintiff’s expert’s affidavits, the Supreme Court observed “the only evidence presented to the court on summary judgment regarding compliance with the standard of care was that provided by the Defendants.” *Id.*, 141 Idaho at 894. As a result, the Court held, “Foster failed to meet his burden

on an essential element of his case and the district court properly granted summary judgment on the medical negligence claim.” *Id.*

In *Gibson v. Ada County*, at issue on a claim of unjust enrichment was the amount of overpayment. The Supreme Court upheld the district court’s ruling that Gibson “failed to provide any accounting of her own.” *Gibson v. Ada County*, 142 Idaho 746, 759 (2006). Gibson had submitted a chart showing wages due to her and another indicating the number of overtime hours she claimed to have worked. *Id.* Nonetheless, the Court observed a “mere scintilla of evidence is not sufficient to preclude summary judgment. . . . Specific facts are necessary to show there is a genuine issue of material fact and this Court affirms the district court's ruling that Gibson has failed to meet this standard.” *Id.*

In a recent decision, the Idaho Supreme Court rejected evidence of the fair market value of the property at issue because the Jensens “did not properly submit affidavit testimony or provide any other admissible evidence tending to establish the fair market value of the Easement.” *Rocky Mountain Power v. Jensen*, 37998, 2012 WL 231254 (Idaho Jan. 26, 2012) (referencing I.R.C.P. 56(e)). The Court ruled that the Jensens’ evidence the “price that the Jensens' relatives are willing to pay for the Jensens' property and the price for which the Jensens previously listed their property with a real estate company are not admissible.” *Id.*, (Citing *Farr W. Inv.*, 148 Idaho at 276, 220 P.3d at 1095). The Court wrote “[i]nstead of providing relevant facts in the form of affidavit testimony or other admissible evidence to oppose the Utility's Motion for Summary Judgment, the Jensens provided *only conclusory assertions and denials of the Utility's pleadings, which are inappropriate under I.R.C.P. 56(e).*” *Id.* (emphasis added) (citing *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005) (the non-

moving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment)).

Like the Defendants in *Rocky Mountain Power*, the State of Idaho merely rests upon “conclusory assertions” and prior briefing similar to a “denial of the pleadings” in opposition to the Coalition’s motion. The State’s response therefore fails to meet the standard under Idaho’s civil rules. Since the Coalition has established no genuine issues of material fact and the State has failed to present specific facts rebutting the Coalition’s position, the Special Master should grant summary judgment on this basis alone.

III. The Respondents Have Provided No Valid Arguments in Opposition to the Coalition’s Motion for Partial Summary Judgment.

The State of Idaho spends 41 of its 53 page response simply reciting the procedural history of the Minidoka/Palisades power right cases and the petition for a basin-wide issue on the “common plan.” Apparently the State believes the litigation over the hydropower water rights and the Court’s decision to deny a basin-wide issue somehow “decided” all issues relating to the remarks necessary for administration of Reclamation’s storage water rights at American Falls and Palisades Reservoirs. This argument has no merit and contradicts the State’s representations to the Court in those subcases.

Although the Minidoka Power Rights subcases resolved part of the “common plan,” the case did not address the remaining issues which are: 1) Winter Water Savings provision; 2) Temporary Upstream Storage; 3) Permanent Exchange; 4) Minidoka Irrigation District Exchange; 5) the AFRD #2 water right and administration remark; and 6) the BIA-Michaud Division remark. In reviewing this list, the State has already stipulated to a remark for the Minidoka power rights along with remarks covering items #1 and #5. *See State of Idaho’s Motion for Summary Judgment* (Subcase No. 01-217 et al.); *Stipulation to Resolve Certain*

Objections (Jan. 26, 2012); *see also*, *Standard Form 5* (Subcase no. 1-6) (filed March 12, 2012).

However, the State refuses to acknowledge the necessary administration required by #2, #3, and #4. With no consistency or legal justification it is obvious the State is simply “picking and choosing” which parts of the Palisades Contract administrative provisions it likes and dislikes for purposes the SRBA. In other words, certain Palisades Contract remarks only appear “necessary” if they fit the State’s litigation strategy at the moment. The State cannot have it both ways and the Court should reject such a schizophrenic approach in these subcases.

In substance, the State has little to offer in response other than its attempt to create a new standard for administrative remarks and a false distinction between the distribution and allocation of storage water in the Upper Snake River Basin. The Court should reject the State’s novel theories and grant the Coalition’s motion for partial summary judgment on the alternative remarks set forth above.

IV. The Coalition is Not “Foreclosed” From Seeking a Determination as to Whether or Not the Individual Palisades Contract Provisions Are Necessary for the Administration of the Water Rights Since this Issue Was Saved for Consideration in the Individual Subcases.

The State spends the majority of its response brief arguing a misguided procedural matter. The State attempts to convince the Special Master that the issues presented in the Coalition’s motion have already been decided by the Court and are thus “law of the case.” *State Br.* at 31. According to the State, the Coalition is “foreclosed” from asserting any arguments related to the Palisades Contracts’ administrative provisions. The State selectively quotes the Coalition’s prior briefing and the Court’s prior decisions from the Minidoka Power Rights

subcases (1-217, *et al.*)⁹ and the “common plan” basin wide issue subcase (00-91015). *State Br.* at 6-22 & 23-46.

First, the doctrine of “law of the case” provides that “where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same.” *Frazier v. Neilsen & Co.*, 118 Idaho 104, 106 (Ct. App. 1990). The law of the case does not “foreclose” the Coalition’s arguments here because the issues presented in the Minidoka Power Rights subcases are not the same as the questions currently pending before the Special Master on the irrigation storage water rights.

The distinction between the issues was expressly recognized by the Presiding Judge in his *Order Denying Motion to Designate Basin-Wide Issue*, Subcase No. 00-91015 (Mar. 1, 2010) (“*Basin Wide Order*”). The Coalition filed a motion seeking to have the following issue designated as a basin-wide issue: “What is the ‘common plan for administering the operation of the Snake River’ that should be ratified, confirmed and approved, and incorporated into the water rights decrees in Basin 01?” The State, and others, opposed the motion, arguing that this “common plan” issue was already before the Special Master in the Minidoka Power Rights subcases. *State of Idaho’s Response in Opposition to Joint Motion to Designate Basin-Wide Issue*, Subcase No. 00-91015 (filed, Jan. 6, 2010). The Presiding Judge agreed and denied the Coalition’s motion.

In denying the Coalition’s motion, the Presiding Judge discussed the “common plan” issue and its impacts on the questions now pending before the Special Master in the Coalition’s motion for summary judgment – i.e. whether the individual provisions of the contracts are

⁹ The Minidoka Power Rights subcases (01-217 *et al.*) and the Palisades Power Rights subcases (01-2068 *et al.*) were decided together. In this brief, these proceedings will be referred to as the “Minidoka Power Rights subcases.”

necessary for administration of the water rights. According to the Presiding Judge, the “common plan” issue was a “foundational issue” that must be addressed prior to determining “what, how, and if provisions of the *Eagle Decrees* should be memorialized in SRBA decrees or through a general provision.” *Basin Wide Order* at 9; *see also Memorandum Decision & Order on Challenge* at 11.

The Presiding Judge clarified that judicial economy required consideration of the specific contractual provisions in the individual subcases:

Further, even though the *Eagle Decrees* make reference to a “common plan” of administration, the “common plan” is comprised of various contract provisions (or “components”) relating to different federal projects. Thus, ***any issues relating to specific projects or contract provisions (as incorporated by the Eagle Decree) would in all likelihood have to be decided in separate or “piece-meal” proceedings*** even if under the “umbrella” of a basin-wide issue.

Basin Wide Order at 11 (emphasis added).

In other words, the Court did not decide whether the individual provisions of the Palisades Contracts were necessary for administration pursuant to Idaho Code § 42-1411. That issue was saved for resolution in the individual storage water right subcases. The State erroneously omits this key finding in an effort to confuse the Special Master on the scope and effect of this prior decision. The Presiding Judge concluded the *Basin Wide Order* by; again, confirming that consideration of the “common plan” issue must occur before consideration of whether or not the individual contract provisions are necessary:

One alternative the Court initially considered was to propose the following alternative basin-wide issue: “To what extent if any should provisions of the reclamation contracts be memorialized in partial decrees or a general provision for Basin 01?” ***However, even if such a basin-wide issue were designated, the Court would nonetheless stay the proceedings to allow the issues regarding the scope and application of the Eagle Decrees already pending before the Special Master to be decided.***

Id. at 11 (emphasis added).

Clearly, the Court’s decision on the “common plan” issue did not “foreclose” consideration of the individual contract provisions as to specific water rights, including the storage rights at American Falls and Palisades Reservoirs. Instead, the Presiding Judge denied the motion to designate a basin-wide issue because one part of the “common plan” was already pending before this Special Master in the Minidoka Power Rights subcases. In those proceedings, the Coalition asserted that the *Eagle Decree* established a “common plan” for the administration of water rights in the Upper Snake River Basin and that all water users in the Upper Snake were bound by the *Eagle Decree*’s common plan. This Special Master rejected that argument, *Order on Motions for Summary Judgment*, and, in his *Memorandum Decision & Order on Challenge* (Subcases 01-217 *et al.*) (Feb. 9, 2011), at pages 11-18, Judge Wildman affirmed that decision, holding that the *Eagle Decree* did not bind non-parties to its dictates.¹⁰

In addition, Judge Wildman rejected the Coalition’s request for a remark on the hydropower water rights only that reflected the power loss payment provisions of the Palisades Contract – holding that the contractual provisions discussing the “right to receive power from the USBOR at certain specified times and rates” should not be placed on the water rights. *Id.* at 23-24; *see also State Br.* at 37 (the Special Master and Presiding Judge “held the winter power operations and power loss payment provisions were merely contractual”).¹¹

¹⁰ The State’s assertion that the Coalition raises the “common plan” issue “for the fifth time since November, 2009” is misleading. With the exception of the motion for basin wide issue (00-91015), all briefing arose in the same subcases and was a result of the procedural requirements of Administrative Order #1, AO#1 § 13 (requiring that motion to alter or amend be filed as a prerequisite to filing a challenge before the Presiding Judge), and a need to have a decision on all issues before the Court, *Memorandum Decision & Order on Motion to Alter or Amend* at 4 (Subcase 01-217 *et al.*) (May 17, 2011) (recognizing that the *Memorandum Decision & Order on Challenge* did not address certain issues before the Court).

¹¹ In so holding the Court relied upon the Coalition’s lack of standing or beneficial interest in Reclamation’s hydropower water rights. That is not the case here since the Coalition holds beneficial and equitable title to the irrigation storage water rights. *Compare Order on Challenge* at 18-20 with *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 113-15 (2007).

Moreover, in the Minidoka Power Rights subcases, the State specifically represented that the “Palisades contracts memorialized the ‘common plan for administering the operation of the Snake River’ above Milner Dam,” and that any “order [on the motion for summary judgment] should also expressly state that it does not prejudice any party’s rights to seek the inclusion of other components of the comprehensive plan for the operation of the Upper Snake River federal reclamation projects.” *Memorandum in Support of the State of Idaho’s Motion for Partial Summary Judgment*, Subcase Nos. 01-217, *et al.* at 8 & 9, n.2 (filed Aug. 18, 2009) (emphasis added). This was because, as the State admitted, the “pending motions for summary judgment simply seek to memorialize the relationship that exists between hydropower generation at the Minidoka and Palisades power facilities and Reclamation storage.” *Reply Brief*, Subcase Nos. 01-217 *et al.*, at 2 (filed Nov. 10, 2009). Indeed, as recognized by the State, in the Minidoka Power Rights subcases:

The issue of whether the SRBA Court should incorporate the Eagle Decrees into these water rights is not properly before the Court.

Id. at 16 (emphasis added).

Notwithstanding these prior representations to the Court, the State has switched legal positions in these proceedings and now asserts that the Coalition is “foreclosed” from addressing whether or not separate provisions from the contracts are necessary for administration. *State Br.* at 23-46. Although the State claimed no party would be prejudiced by the prior decision regarding the single issue related to the power rights, the State has taken the opposite position here. The State is legally estopped from taking such contradictory and “incompatible” positions before the Special Master. *See A&J Const. Co. v. Wood*, 141 Idaho 682, 684-85 (2005) (“Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position”).

In order to “protect the integrity of the judicial system,” *id.*, the State’s “foreclosure” argument should be squarely rejected. *Id.*; *Heinze v. Bauer*, 145 Idaho 232, 235 (2008) (“Judicial estoppel is intended to prevent a litigant from playing fast and loose with the courts”).

Contrary to the State’s theory, the Coalition does not ask the Special Master to reconsider the binding nature of the *Eagle Decree*. That issue has been decided, with Judge Wildman holding that the *Eagle Decree* did not bind non-parties to its dictates. *Memorandum Decision & Order on Challenge*. Rather, the issue before the Special Master is whether or not specific contractual provisions should be included on the partial decrees pursuant to the adjudication statutes (I.C. § 42-1411) because they are necessary for the administration of the storage water rights. There is no doubt that this issue is properly before the Special Master in these individual subcases. In fact, this is exactly what the Presiding Judge intended in deciding the “common plan” basin-wide issue. *Basin Wide Order* at 10.

In the Minidoka Power Rights subcases, the specific contractual provision addressed the “right to receive power from the USBOR at certain specified times and rates.” *Memorandum Decision & Order on Challenge*, Subcases 01-217 *et al.*, at 23-24. Although the Court held that this specific provision was “purely contractual” and should not be included on the partial decrees, *id.*, the Court did not address any other contractual provisions and whether they were necessary for administration. The State’s attempt to extrapolate such a holding from those decisions is therefore erroneous and an obvious misrepresentation of the prior decisions. *State Br.* at 44-46. Again, pursuant to the Presiding Judge’s directive, consideration of the individual administrative provisions was left to be resolved in the individual subcases. *Basin Wide Order* at 10.

The State argues that the Court's rejection of the remark in the power rights decisions automatically means that no provision from the Palisades contract may be included on the partial decrees. *State Br.* at 39 & 44-46. There is no law supporting the State's theory that an administrative provision cannot be placed on a partial decree merely because it originates in a contract. Moreover, the State's argument contradicts its own position and theories in the Minidoka Power Rights subcases and the AFRD #2 water right subcase where it specifically agreed to remarks originating from the Palisades Contracts. *See State of Idaho's Motion for Summary Judgment* (Subcase No. 1-217 et al.); *see also*, SF5 for Reclamation / AFRD #2 water right 1-6 (filed 3/12/2012).¹²

Similarly, this Court's determination that the *Eagle Decree* is not binding on non-parties does not automatically mean that the provisions from the Palisades Contracts are not necessary for administration. Indeed, Mr. Olenichak testified that these provisions are used "in water right administration," Ex. 41 (Tr. Vol. II, p.372, lns. 16-20), *Thompson Aff.*, and that the *Eagle Decree* and contracts are the sole source of these provisions, *id.* (Tr. Vol. II, p.316, lns. 8-13). The law requiring the inclusion of provisions "necessary for ... administration of the right" on partial decrees, I.C. § 42-1411(2)(j), does not discriminate on the source of the administrative provisions. *See SWC Response Brief* at 45 (discussing partial decrees reflecting agreements between a portion of the parties to the SRBA proceedings). As such, the fact that the provision originates from a contract does not "foreclose" consideration of the issue before the Special Master.

¹² The language agreed to for the quantity remark in water right 1-6 is based upon the Palisades Contracts. *See Thompson Aff.*, Ex. 20 (Reclamation contract with Minidoka Irrigation District).

Noticeably absent from the State's selection of quotes from the prior briefing and decision is any reference to the Presiding Judge's recognition that the "common plan" issue is not the same as the issue before the Special Master in this pending motion. Indeed, the issues are distinct. In sum, there is no "law of the case" in these subcases that would "foreclose" the Coalition's present motion. The Special Master should reject the State's arguments accordingly.

V. The Administrative Provisions Confirmed and Ratified by the *Eagle Decree* are Binding on the Parties to that Decree and Junior Water Right Holders.

None of the Respondents dispute the Coalition's position that parties to the *Eagle Decree* are bound by its provisions and cannot challenge them in the SRBA. *See SWC Brief* at Part II. As such, summary judgment is appropriate on this issue.

However, the State does challenge the Coalition's assertion that junior appropriators take the system as they find it and are, therefore, bound by the administrative provisions confirmed and ratified in the *Eagle Decree*. The State argues that the Coalition's arguments are contrary to the Presiding Judge's *Memorandum Decision & Order on Challenge* because the Presiding Judge determined that the *Eagle Decree* did not bind non-parties to "its terms." *State Br.* at 41. Importantly, however, the State does not dispute that the summary supplemental adjudication statute, I.C. § 42-1405 (1948), only provided authority to adjudicate water rights. *SWC Br.* at 25. The State does not dispute the basic principle of Idaho water law that junior water rights "take the system as they find it" and are "subject to all prior rights." *Big Wood Canal Co. v. S.H. Chapman*, 45 Idaho 380, 402 (1927). Nor can the State point to any reference in the Presiding Judge's order wherein it was determined that the summary supplemental adjudication statute provided the district court with any authority to determine administrative provisions separate and apart from the water rights being adjudicated. *Id.* A recurring theme in the State's brief, rather than address these issues, the State selectively quotes from the Coalition's briefing and the

Presiding Judge's orders and asserts that the Coalition is now "redefining" its arguments. *State Br.* at 42.

The State's arguments suffer from the same fatal flaw as its arguments regarding the "common plan" – namely, its mistaken belief that the "common plan" issue addressed in the Minidoka Power Rights subcases, and the necessity of administrative provisions in individual subcases, as addressed in the Coalition's pending motion, are the same. *See State Br.* at 34-44. As discussed above, however, the State's attempt to conflate these issues is not consistent with the Presiding Judge's decisions. The Presiding Judge did not consider whether the individual administrative provisions confirmed and ratified by the *Eagle Decree* are binding on non-parties to that decree. That issue was not before the Court. Indeed, questions about the individual provisions were left for decision in the individual subcases. *Memorandum Decision & Order on Challenge* at 11.

The State repeatedly quotes provisions from previous decisions by the Court that "contract rights" are not elements of a water right and that a watermaster should not "resolve private contract disputes as part of their administrative duties." *State Br.* at 39. These statements, however, were made in orders from the Court addressing the "right to receive power from the USBOR at certain specified times and rates." *Memorandum Decision & Order on Challenge* at 23-24; *see also State Br.* at 37 (the Special Master and Presiding Judge "held the winter power operations and power loss payment provisions were merely contractual").

Unlike the "power loss payment" provision, the issue here is not merely contractual. The administrative provisions specifically include the Watermaster in making determinations, including calculating storable inflow and implementing the various storage exchanges. Indeed, the provisions requested through the Coalition's motion address the ability of Reclamation to

divert and store water in reservoirs not identified on the water right as the point of diversion or place of use for irrigation storage. For example, the ability to divert water to storage at a different reservoir than listed on the water right necessarily implicates administration of that particular storage water right. *See* Ex. 41 (Tr. Vol. II, p. 203, lns. 12-16), *Thompson Aff.* (it is necessary to include a remark authorizing the diversion of water to different reservoirs because, “absent this remark, someone can make the argument that the water that is stored to the American Falls right has to physically reside in American Falls Reservoir”); *id.* (Tr. Vol. II, p. 309, lns. 2-14) (administration of storage rights “require[s]” knowledge as to “where MID is receiving its storage from”).

In summary, no party disputes the *Eagle Decree* is binding upon the parties to that proceeding. Moreover, the administrative provisions necessary for administration have guided the Watermaster for over 40 years and any junior water right holder that appropriated water after their initiation assumed its right with full knowledge and acceptance of this storage right administration. There is no legal basis to dispute the Palisades Contracts’ provisions and their implementation now.

VI. The State Fails to Acknowledge the Legal Standard for Remarks Regarding Administration.

Idaho law is clear on the standard to include remarks for administration on a water right in the SRBA. Both claimants and the Director “shall” include the following on their claims and recommendations: “such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right or for administration of the right.” *See* I.C. §§ 42-1409(1)(k); 1411(2)(j). Reclamation and IDWR agree that a remark addressing the administrative conditions in the Palisades Contracts is necessary for the American Falls and Palisades storage water rights. *See Reclamation Br.* at 6-9; Exs. F, G to *Arrington Aff.*

Since Reclamation's proposed alternatives provide clear and precise references for the Watermaster and his successor, they are preferred to both IDWR's general remark and the Coalition's proposal its summary judgment motion.

Dissatisfied with the Legislature's standard, the State argues that a remark cannot be placed on a partial decree unless it is shown that the remark is "absolutely necessary." *See State Br.* at 47. This argument fails for at least the following reasons.

First, the adjudication statutes are plain and unambiguous. When interpreting a statute, the Court's primary objective is to derive the Legislature's intent in enacting the statute. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 312 (2005). Statutory interpretation begins with the literal language of the statute. *Id.* If the language is unambiguous, the Court need not engage in statutory construction and the statute's plain meaning controls. *Id.* In other words, "[a]n unambiguous statute must be given its plain, usual, and ordinary meaning." *Flying Elk Inv., LLC v. Cornwall*, 149 Idaho 9, 15 (2010). Since the adjudication statutes do not contain the term "absolutely," *see* I.C. §§ 42-1409(1)(k), 1411(2)(j), any attempt to rewrite the statutes must be rejected. If a remark is necessary for the definition, clarification, or administration of a water right, it must be included on the partial decree. In other words, the Special Master must apply the law as written.

The State's only support for this contention is a reference to the Presiding Judge's recent *Order Denying Request for Attorneys Fees and Costs* (Subcase No. 37-21112, May 4, 2012) ("*Attorneys Fees Order*"). In that decision the Court addressed whether or not a party to a subcase should be awarded attorneys fees following the resolution of objections to the subcase. In discussing whether there was a "prevailing party," the Court described the difference between "explanatory material," which does not appear on the face of a partial decree, and "remarks,"

which do appear on the face of a partial decree. The Court explained that during the “early stages in the SRBA” an effort was made to standardize and simplify the partial decree form. *See Attorneys Fee Order* at 4. Although the Court did not cite the “determination” referred to, there is no indication that the distinction between “explanatory material” and “remarks” on the decree changed the administrative remark standard required by Idaho law. The State’s attempt to judicially rewrite the standard provided by law should be rejected.

If a remark is necessary for administration, it must be included on the decree. There is no requirement that the Court must find the remark to be “absolutely necessary” as suggested by the State. The Special Master should reject the State’s argument accordingly.

VII. Contrary to the State’s “Private Contract Only” Theory, the Water District 01 Watermaster is Specifically Involved in Administering the Exchange Remarks.

Relying upon decisions in other unrelated cases, the State argues the proposed remarks are unnecessary for Reclamation’s storage water rights because it would risk “putting the watermaster and the Department in the position of mediating private contract disputes . . . and would complicate water rights administration rather than make it more efficient.” *State Br.* at 48. Apparently the State of Idaho has failed to actually read the relevant portions of the Palisades Contracts and the fact the Watermaster is required to participate in the administration and distribution of the storage rights at issue in this case.¹³ Moreover, since operating and managing the Upper Snake River storage system is complicated, that is the very reason precise remarks and directives for the Watermaster are necessary for administration.

Unlike the “power loss” provision in the Minidoka Power Rights cases, here the Water District 01 Watermaster is specifically required to participate in the distribution and calculation

¹³ Although not a party to the contracts, the Water District 01 Watermaster is bound by the provisions as a defendant in the *Eagle Decree* proceeding. Contrary to the State’s argument, there is no lack of “personal jurisdiction” over the Watermaster and his duty to participate in the administration of the various storage water rights, including implementing the exchange provisions.

of the storage water exchanges. For instance, the Permanent Exchange remark for BID and NSCC provides as follows:

Beginning with the 1952-1953 storage season, ***there shall be a determination***, at the end of each storage season in which the lower valley exchanged space fails to fill, taking carryover storage into account, (1) of the amount by which the American Falls storable inflow to which the lower valley exchanged space was entitled during that season failed to fill that space; and (2) of the amount, if any, by which the Jackson Lake storable inflow to which the upper valley exchanged space was entitled during that season failed to fill that exchanged space. If the amount under (1) exceeds that under (2), there shall be credited to the lower valley exchanged space and charged to the upper valley exchanged space an amount of stored water equal to the difference, but not in excess of the amount required to fill the lower valley exchanged space as of the end of that storage season. ***The determinations under this article shall be made by a committee of three comprising the state watermaster of District No. 36***, a representative to be selected jointly by the Burley and Minidoka irrigation districts and the Company, and the officer of the United States in charge of the Minidoka Project.

See Ex. 1 to *Coalition's Motion for Partial Summary Judgment* (emphasis added).¹⁴

As a member of the committee designated to calculate the exchange, the Water District 01 Watermaster is directly involved in this administration. As the person responsible for calculating “storable inflow” into both Jackson Lake and American Falls reservoirs, the Water District 01 Watermaster plays a central role in this determination.¹⁵ Contrary to the State’s theory, the Watermaster is already involved, and including a remark would not “unnecessarily inject” him into any private contract dispute. Moreover, even under the State’s so-called distinction between administration of natural flow into the reservoir and allocation of storage, the exchange remark’s requirement to calculate “storable inflow” meets the State’s criteria as a remark necessary for administration of the water rights.

With respect to the Minidoka Irrigation District exchanges, the State fails to appreciate how MID made the requests for such administration to the Water District 01 Watermaster, *See*

¹⁴ At the time of the contract Water District 01 was “Water District No. 36.”

¹⁵ See Olenichak Depo. Tr. Vol. II, pp. 165-66, 185-88. *Thompson Aff.*, Ex. 41.

Ex. 58; *Thompson Aff.* If the Watermaster had no role in implementing this provision, as the State seems to suggest, then what would be the purpose of MID sending the letters requesting implementation of the exchange?

Next, similar to the Permanent Exchange remark, the Temporary Upstream Storage Remark also includes language referencing the watermaster's role:

It is the purpose of the United States and the water users having storage rights in the reservoir system (including the District) to have the reservoir system so operated as to effect the greatest practicable conservation of water. In keeping with this purpose, the endeavor will be to hold stored water in reservoir system space that is farthest upstream. ***Water in storage in any of the reservoirs of the system may, however, when the watermaster and the Advisory Committee determine this to be in the interest of water conservation, be held temporarily in unoccupied space in any other reservoir of the system.*** And the District hereby consents to the making, ***with the approval of the watermaster,*** of annual exchanges of stored water among the various reservoirs of the system. No such temporary holding of water or such annual exchanges shall, however, deprive any entity of water accruing to space held for its benefit.

See Ex. 1 to *Coalition's Motion for Partial Summary Judgment* (emphasis added).

Holding the storage under the American Falls water right in the place of use of a storage water right in an upstream reservoir like Palisades is accomplished by this provision. The Water District 01 Watermaster is directly involved and must approve this administration, and the spaceholders and Reclamation have agreed to this operation of annual exchanges. Again, the State fails to recognize the plain language of the contract that includes the Watermaster in this determination. Importantly, IDWR recommended a remark to address this matter and the State of Idaho did not object to it. See *State of Idaho's Objections* (subcases 01-2064 and 01-2068).

Nonetheless, the State now opposes the Temporary Upstream Storage remark and argues that such administration could continue without a reference on the water right. *State Br.* at 52. The State suggests that the operation authorized by the Palisades Contracts' provision is "firmly supported by the most basic principles of Idaho water law." *State Br.* at 52. However, the State

provides no legal basis for its claim other than a misreading of *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011) and the unsupported testimony of Mr. Olenichak. *State Br.* at 52. Contrary to the State’s implication, the Supreme Court in *Clear Springs* did not authorize a storage water right holder to change its place of use without any authorization. The State argues that a “maximum use” policy means a water right holder can unilaterally change its place of use without any formal approvals. However, a close reading of *Clear Springs* reveals the Court was addressing the Ground Water Users’ arguments that “full economic development” precluded conjunctive administration of their junior ground water rights. 252 P.3d at 85-89. The Court examined the constitutional provision authorizing formation of the Idaho Water Resource Board and the enactment of the Ground Water Act (I.C. § 42-226) and commented:

The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

252 P.3d at 89 (emphasis added).

While the State leaves the last part of the sentence out for its argument, it is obvious the Court was discussing conjunctive administration, not any proposition that a storage right holder is free to store water in any other place of use contrary to the stated elements of the water right. The State’s misreading of *Clear Springs* should be rejected.

Moreover, contrary to the State’s truncated reference to the deposition transcript, Mr. Olenichak testified that the Temporary Upstream Storage remark included in the Palisades Contracts is necessary for administration:

Q. [BY MR. THOMPSON]: So is this remark, I guess, in your opinion necessary for the administration of the water right?

A. [BY MR. OLENICHAK]: ***What it allows for is the continued practice of holding water high up in the system***, absent this remark, someone can

make the argument that the water that is stored to the American Falls right has to physically reside in American Falls Reservoir.

Olenichak Depo. Tr. Vol. II, p. 203, lns. 10-16; *Thompson Aff.*, Ex. 41 (emphasis added).

Although Mr. Olenichak later claimed that the water district could administer the storage rights in the same manner without the Temporary Upstream Storage provision, he could not identify a single legal authority to back up his claim, other than the Palisades Contracts and *Eagle Decree*:

Q. [BY MR. FLETCHER]: And getting back to my question on this, other than the Eagle Decree and the contracts, is there anything that you are aware of that would authorize the Department to make these kind of temporary exchanges?

A. [BY MR. OLENICHAK]: No, I'm not aware of any additional –

Q. If this language is not referenced in the water right, will the Department change the way it administers storage rights?

A. No.

Q. Why not? Well, what would allow you to do it any other way besides priority if this language is not in the water right?

A. Because by holding the water up high, it maximizes at amount of water in the system, and that is a benefit to the system, and we would do it regardless of whether the language was in the Eagle Decree or not.

Q. What would allow you to do that?

A. I don't know of anything that would allow us not to do it.

* * *

Q. Well, I don't have a right to store water anywhere except American Falls Reservoir under that example.

A. ***Well, that's the purpose of the remark, to clarify that there is the ability to store water in any reservoir above Milner.***

Olenichak Depo. Tr. Vol. II, pp. 316-317; *Thompson Aff.*, Ex. 41 (emphasis added).

Contrary to the State's argument, Mr. Olenichak's testimony does not establish a "new" legal theory that would authorize a storage water right holder to change its place of use to any other reservoir. As Mr. Olenichak admits, it is the "purpose" of the Temporary Upstream Storage remark "to clarify that there is the ability to store water in any reservoir above Milner." Clearly, Mr. Olenichak testified that the Temporary Upstream Storage remark is necessary for purposes of water right administration.

Importantly, both IDWR and Water District 01 recognize the necessity of including the exchange remarks on the American Falls and Palisades storage water rights. The State provides no legal basis to dispute their necessity. The Special Master should reject the State's argument on these remarks accordingly.

VIII. There is No Support for the State's Natural Flow / Storage Rights Administration Distinction.

In its final effort to oppose Reclamation's and the Coalition's storage remarks the State creates an alleged distinction between the administration of water rights to divert natural flow and contract rights to use storage water. *State Br.* at 51-58. The State argues that the contract provisions only apply to the "allocation" of storage water and not administration of the water rights. *Id.* Although the State admits the Palisades Contract provisions are necessary for the administration of contract "storage rights," it argues the provisions have no place in administering the American Falls and Palisades water rights. *Id.* at 57. The State ignores the actual administration of natural flow and storage water rights in Water District 01, and how the operations of the reservoir and administration of the storage water rights work together. Furthermore, the State's argument contradicts the testimony of Tony Olenichak the Water District 01 Program Manager.

First, the State contradicts itself by claiming the “Winter Water Savings” pertains only to “storage administration, not natural flow administration.” *State Br.* at 51. The State and other parties, including Reclamation and the Coalition, agreed to the priority dates for “winter water storage” space by recognizing two separate water rights for both American Falls and Palisades Reservoirs. *See Stipulation to Resolve Certain Objections* (Jan. 26, 2012). The basis for this advanced priority for certain storage space is the Palisades Contracts. *See Ex. 1 to Coalition’s Motion for Partial Summary Judgment*; *see also* Olenichak Depo. Tr. Vol. II, pp. 209-211. Although the State opposes a remark adopting the contract language, it cannot escape the fact that it already stipulated to the substance of the contract provision. The State apparently has no problem accepting this part of the Palisades Contracts storage water right administration on the theory that “[s]uch water rights would not injure any other water right holders or subject them to additional obligations because they would simply advance by one day the priority of a portion of the existing rights.” *State Br.* at 51, n. 26. While the one-day priority advancement may be true for the American Falls water right, the Palisades winter water savings space advances the priority nearly 20 years, from April 1, 1939 to March 29, 1921. There are several natural flow water rights in Water District 01 that fall in between those two priorities. *See Director’s Reports, Basin 01, Parts 1 & 2.*

Regardless, if the State’s position is that a Palisades Contract remark is acceptable if it: 1) does not injure any water right holders; or 2) subject them to additional obligations; it is obvious the remaining remarks meet that test. Indeed, the State has failed to show how the Temporary Upstream Storage, Permanent, and Minidoka Irrigation District Exchange remarks would injure any junior water right holders or subject them to “additional obligations.”

The testimony given by Water District 01 agents refutes the State's argument. For example, Mr. Olenichak described the administration of both natural flow and storage water rights, and how the distribution of storage fits into that administration in his deposition:

Q. [BY MR. THOMPSON]: And my question is, would you agree that the – knowing the allocations for each canal, knowing the storage entitlement is part of your administration?

A. [BY MR. OLENICHAK]: It is part of it, yes.

Q. And I guess it is necessary for the watermaster to know what each canal has been allocated for storage for the year as part of your administration through the season?

A. Yes. You know, I've heard the word administration used several times, and I'm not sure if administration is as appropriate as regulation. For the purposes of regulation, the watermaster needs to know what the natural flow supply is to a diversion in addition to its storage allocation.

Q. So if you get to the end of a season and a canal may be running out of storage, you would regulate that diversion unless they have taken other measures, rented water, done something else to continue to be able to divert?

A. Correct.

Q. And you review that regulation of the head gate at the river as something different than water right administration, or are they part of the same thing?

A. No. I've been using it as meaning the same thing.

Olenichak Depo Tr. Vol. II, p. 369-371; *Thompson Aff.*, Ex. 41.

Mr. Olenichak further confirmed that Water District 01 has used, and currently uses the referenced contract remarks for purposes of water right administration:

Q. [BY MR. THOMPSON]: So it is not just – I guess, would you agree that the provisions referenced in this decree, the exchange provisions that Mr. Fletcher went through and said, here is an example of Minidoka Irrigation District requesting the watermaster to designate certain space back in the '60s for that exchange, but would you agree that those provisions have been part of administration, not just a contract agreement between the Bureau and that spaceholder?

A. [BY MR. OLENICHAK]: If those provisions were incorporated into the water accounting, yes, it is part of the administration.

* * *

Q. And do you have any records, information from the Water District that they disagreed with those provisions or what was entered in this decree?

A. No, I've never seen any.

Olenichak Depo. Tr. Vol. II, p. 373; *Thompson Aff.*, Ex. 41.

Clearly, Water District 01 is involved in the administration of storage water rights, which includes calculating exchanges and determining the available natural flow and storage that is in the Snake River during the irrigation season. The State's so-called distinction that administering the allocation of storage water versus natural flow into a reservoir misses the point. Contrary to the State's theory, implementing the various exchange provisions of the Palisades Contracts are part and parcel of Water District 01's normal water right administration. The Special Master should reject the State's argument accordingly.

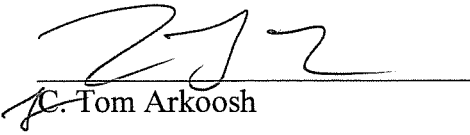
CONCLUSION

IDWR has recommended a reference to the Palisades Contracts on the American Falls and Palisades storage water rights. Reclamation and the Coalition agree upon the necessary remarks to address the Temporary Upstream, Permanent, and Minidoka Irrigation District Exchange provisions. No party, including the State of Idaho, has provided any factual or legal basis to dispute the substance and administration required by these remarks.

The language offered by Reclamation is precise and clarifies how the water rights should be administered. The Coalition agrees with the modified remarks and respectfully requests the Special Master to grant the joint motion for partial summary judgment and recommend the remarks for the American Falls and Palisades storage water right partial decrees.

DATED this 29th day of June, 2012.

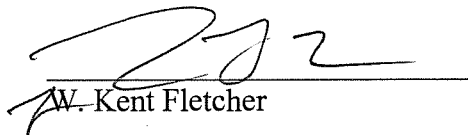
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*Attorneys for American Falls
Reservoir District #2*

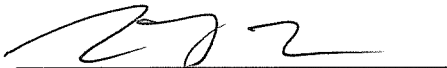
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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2012, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S REPLY IN SUPPORT OF JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT** on the person(s) listed below, by U.S. Mail, and electronic mail if available:

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ATTACHMENT A

01-2064
01-2064A
01-2064B
01-2064C
01-2064D
01-2064E
01-2064F
01-2064L
01-10042
01-10042A
01-10042B
01-10053A
01-10190

01-2068
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