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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUL 27 2012	
By _____	Clerk
_____	Deputy Clerk

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	)	Subcases:
	)	01-2064, et al. (American Falls Reservoir)
	)	and
	)	01-2068, et al. (Palisades Reservoir)
Case No. 39576	)	(see list of subcases attached) ¹
	)	
	)	ORDER ON MOTIONS FOR PARTIAL
	)	SUMMARY JUDGMENT

BACKGROUND

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report, Reporting Area Basin 01, IDWR Part 2* on December 19, 2006. The Director recommended license-based claims 01-2064 (American Falls Reservoir) and 01-2068 (Palisades Reservoir) to the United States of America acting through Regional Director PN Region, Bureau of Reclamation PN-3100, 1150 N. Curtis Road, Suite 100, Boise, Idaho, 83706-1234 ("Bureau", "BOR" or "U.S."). The Director recommended the American Falls Reservoir claim for a storage right of 1,672,590 afy with a priority date of March 30, 1921, and the Palisades Reservoir claim for a storage right of 1,200,000 afy with a priority date of July 28, 1939.

The Director also recommended both partial decrees include remarks at issue here referencing Spaceholder Contracts and the *Eagle Decrees*:

The delivery of water to this right may be subject to procedures described in the United States Bureau of Reclamation "space holder" contracts and the *Burley Irrigation Dist. v. Eagle*, Supplemental Decree (Idaho 5th Jud. Dist., July 10, 1968) and *Aberdeen-Springfield Canal Co. v. Eagle*, Supplemental Decree (Idaho 7th Jud. Dist., March 12, 1969) together with the natural-flow and storage deliveries as calculated by the Idaho Department of Water Resources.

¹ The 22 subcases, other than 01-2064 and 01-2068, are competing or overlapping claims for the two BOR American Falls and Palisades Reservoirs irrigation storage claims.

Objections

BOR – The first *Objections* were filed by claimant the BOR on April 19, 2007, objecting to quantity, priority date, purpose of use and other provisions. It suggested references to the *Eagle Decrees* be stricken and under the quantity element, it suggested the following remark: "This water right includes the right to refill under the priority date of this water right to satisfy the United States' storage contracts."²

Canal Companies and Milner Irrigation District – The Twin Falls and North Side Canal Companies and the Milner Irrigation District filed *Objections* the same date objecting to name and address, quantity, priority date and remarks.

State of Idaho – The State filed its *Objections* on April 20, 2007. Under priority date, it wrote: "Subordination language based on historic practice needs clarification." Under purpose of use, it wrote: "Reference to contracts between the United States and Idaho Power Company needs clarification." Finally, under the other provisions necessary element, it wrote: "Ownership language needs clarification in light of the Idaho Supreme Court's decision in *United States v. Pioneer Irrigation District*, SRBA subcase no. 91-00063."

Idaho Power Company – Idaho Power filed its *Objections* the same date objecting to quantity, priority date, purpose of use, period of year, place of use and other provisions necessary.

City of Pocatello – On April 20, 2007, Pocatello filed an *Objection* only in subcase 01-2068 (Palisades Reservoir) objecting to name and address ("Should include acknowledgement of the use of the water under Pocatello's contract³ that is held by the City of Pocatello as consumer or user of the water."), purposes of use and period of year (municipal, irrigation, power, domestic, industrial commercial, recharge and mitigation) and place of use (Pocatello's service

² Later, the State of Idaho said the United States' *Objection* and its proposed refill remark was the impetus for the State's *Motion for Partial Summary Judgment* and its own proposed refill remark, including subordination. The State also said its proposed remark was intended to address only the American Falls and Palisades Reservoirs.

³ Pocatello wrote it has Contract No. 14-06-100-1825, dated January 8, 1960, with the BOR for 4.1667% of the reservoir capacity.

area and area "below Palisades Reservoir that have or may in the future receive water from the City of Pocatello's Palisades Reservoir storage right through mitigation or through rental or lease from the City of Pocatello").

Other Irrigation Districts – The Falls, Burley, A&B and Minidoka Irrigation Districts all filed Objections on April 20, 2007, objecting to name and address, quantity, priority date, purpose of use, other provisions or "remarks and conditions."

State's Motion for Partial Summary Judgment

The State of Idaho filed a *Motion for Partial Summary Judgment* on January 25, 2012, concerning three issues: 1) whether Pocatello's ownership interest in Palisades Reservoir has been determined; 2) whether partial decrees for storage water rights in both reservoirs should include references to the 1968 and 1969 *Eagle Decrees*; and 3) whether partial decrees for both storage water rights should include the following "refill" remark necessary to define and/or efficiently administer the rights:

This right is filled for a given irrigation season when the total quantity of water that has been 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's *Motion*, at 2.

The State lodged its 49 page *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment* on February 21, 2012. On the first count of its *Motion for Partial Summary Judgment*, the State argued *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) effectively disallowed Pocatello's claim of an ownership interest to a storage water right in Palisades Reservoir – the storage right should be decreed to the U.S. with a *Pioneer* remark.

On the second count, the State wrote the *Eagle Decrees* should **not** be referenced in either storage right because the SRBA Court has determined those decrees "are not binding on the State or the United States Bureau of Reclamation ('Bureau'), did not adjudicate any water rights or administrative provisions, and that the 'common plan' consists of little more than an agreement among spaceholders to be bound by each others' contracts with the Bureau." State's *Memorandum*, at 2.

On the third count, the refill remark, the State pointed out the IDWR Director's recommendations for claims 01-2064 and 01-2068 did not include a remark authorizing in-season refill which "could create ambiguity in future water rights administration, or even provide grounds for a legal challenge to the Bureau's 'refill' operations, because an Idaho storage water right is entitled to only a single 'fill' each irrigation season, unless the water right specifies otherwise." State's *Memorandum*, at 18. The State then summarized its view of key arguments:

While the members of the "Surface Water Coalition" agree that a remark authorizing "refill" operations is necessary, they contend that "refill" should be under the same priority as the initial "fill" during the same season. Thus, the sole dispute as to "refill" is whether it should be subordinate to other water rights, or have the same priority as the initial "fill." Idaho law requires that storage "refill" be subordinate to all existing and future water rights because priority "refill" would result in decreeing unquantified, open-end rights to "excess" water. The State's "refill" remark satisfies Idaho law and is consistent with historic reservoir operations and water rights administration, while the priority "refill" remark sought by the Surface Water Coalition is contrary to law and to both current and historic operations and administration [footnote omitted].

State's *Memorandum*, at 3.

Stipulation

The day after the State filed its *Motion for Partial Summary Judgment*, the parties – except Pocatello – filed a *Stipulation to Resolve Certain Objections* agreeing to: 1) adjudication of separate water rights for "winter water savings" under the Palisades Contracts for Palisades and American Falls Reservoirs, 2) the active storage capacity of American Falls Reservoir, plus splitting 01-2064 into 01-2064 and 01-10042 and 3) amendment of the recommended ownership remark for water rights 01-2064 and 01-2068 in accord with *Pioneer Irrigation*.

The parties also agreed to stay multiple competing irrigation storage claims pending resolution of Pocatello's objections in the Palisades Reservoir subcases. Pocatello's competing claim at Palisades Reservoir is 01-2068Y.

Surface Water Coalition Opposition Memorandum

The Surface Water Coalition ("SWC")⁴ lodged its 75 page *Joint Memorandum in Opposition to the State of Idaho's Motion for Partial Summary Judgment* on April 16, 2012. It

⁴ The SWC includes American Falls Reservoir District #2, Minidoka Irrigation District, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company.

argued the State's *Motion* threatens the physical fill of American Falls and Palisades Reservoirs and longstanding agreements that govern storage operations:

Instead of acknowledging the provisions necessary for operating the reservoirs and administering the storage rights, the State asks this Court to delete IDWR's recommended *Eagle Decree* remark and to subordinate the physical fill of the reservoirs in favor of a 'paper fill' procedure that does not reflect actual water in the reservoirs or administration required by Idaho law. . . . Contrary to the State's theory, Idaho does not have a "one-fill" rule. Reservoirs throughout the State routinely fill and refill during the year to obtain maximum water storage. Whereas the Upper Snake River Reservoirs must maintain flood control space, storage is annually filled, released, and refilled as part of these routine operations. Since water that is released for flood control is not available to satisfy a spaceholder's irrigation needs during the peak of the irrigation season, this routine refill is vital to the operation of the Upper Snake Reservoir system.

In ignoring this reality, the State offers a new remark based on an accounting program that arbitrarily charges water to a reservoir right regardless of the actual physical contents. The State's remark further conflicts with the recommendations made by IDWR. More importantly, the remark conflicts with Idaho law and threatens the future physical fill of the Upper Snake Reservoir system [emphasis in original; footnote omitted].

SWC's *Memorandum*, at 2-3.

In a footnote, the SWC wrote: "To the Coalition's knowledge, the State has never attempted to have 'refill' of any other irrigation storage rights anywhere in the State or SRBA subordinated other than water rights 01-2064 and 01-2068." SWC's *Memorandum*, at 50, fn 28. The SWC added that licenses issued by IDWR for American Falls and Palisades Reservoirs contain no conditions limiting refill of storage in priority and the State is barred from collaterally attacking those licenses. SWC's *Memorandum*, at 51.

Fremont-Madison's Response

The Fremont-Madison Irrigation District, Idaho Irrigation District and Blackfoot Irrigation Company ("Fremont-Madison") filed their *Response to State of Idaho's Motion for Partial Summary Judgment* on April 16, 2012. They fully concurred with the State's arguments:

1) *Pioneer Irrigation* determined Pocatello's ownership interest in water stored in Palisades Reservoir; 2) neither American Falls Reservoir nor Palisades Reservoir partial decrees should include any reference to the *Eagle Decrees*; and 3) both reservoir storage water right decrees should include the "refill" remark urged by the State.

United States' Response

The U.S. filed its *Response in Partial Opposition to the State of Idaho's Motion for Partial Summary Judgment* on April 16, 2012. It agreed with the State's first two requests:

[*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.

...

As the State points out, the [SRBA] Presiding Judge has recognized that the Eagle Decrees neither adjudicated any water rights, nor any administrative provisions. . . . [T]he 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 [citation and footnote omitted].

U.S. *Response*, at 2-3.

As to the State's third request – the "refill" remark – the U.S. wrote:

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 right which would decree a portion of the complex system used for administration and accounting of those 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 foundation[;] and it has the potential to penalize Reclamation when operational mandates require it to pass water rather than store it.

...

There is no question that a water right holder has some discretion in deciding how to exercise its water rights. . . . 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 [footnote omitted].

U.S. *Response*, at 3-4.

Pocatello's Response

Pocatello filed its *Response to State of Idaho's January 25, 2012 Motion for Partial Summary Judgment* on April 16, 2012. It wrote:

Pocatello agrees the ownership dispute can be ended, if the State's Motion is intended to clarify that Pocatello has equitable ownership as a "consumer or user of water" for the irrigation purpose included in the Director's Report for 1-2068, and for any additional purposes of use that may be decreed by the SRBA Court for 1-2068 or 1-2068Y. However, Pocatello respectfully asserts that the *Pioneer* decision is controlling legal authority for an ownership interest in 1-2068, the storage water right for Palisades Reservoir, only in relation to "irrigation rights and interests" because by its own terms, "The issues in [*Pioneer*] concern irrigation rights and interests." [citing to *Pioneer*].

...

Equitable ownership in the United States' Reclamation storage water rights in the SRBA for purposes other than irrigation is a genuine, disputed issue of material fact and law, as is the extension of *Pioneer* to non-irrigation entities.

Pocatello's *Response*, at 3-4.

Surface Water Coalition Joint Motion for Partial Summary Judgment

The SWC filed its *Joint Motion for Partial Summary Judgment* on April 19, 2012. They offered new arguments in support of including Spaceholder Contract remarks in partial decrees for American Falls and Palisades Reservoirs:

The Palisades Contracts established an administrative scheme for the Upper Snake River Reservoir System that is binding on all parties to these agreements. Furthermore, these provisions are binding on all junior water users, who, in developing their water rights, took the system as they found it. Since these provisions are necessary for the administration of water rights 01-2064 and 01-2068, they should be identified on the partial decrees.

SWC's *Joint Motion*, at 2.

The SWC then offered two alternative space holder contract remarks:

The delivery of water to this right is subject to the procedures described in the United States Bureau of Reclamation spaceholder contracts, as amended, in connection with the Palisades project and the Minidoka project, which are attached as Exhibits A, B (Provisions 19 and 20), C (Provision 19a), E (Provisions 21 and 22), and F (Provisions 8a) to the Burley Irrigation Dist. v. Eagle, Supplemental Decree (Idaho 5th Jud. Dist., July 10, 1968) and Aberdeen-Springfield Canal Company, Supplemental Decree (Idaho 7th Jud., Dist., March 12, 1969).

[or]

The delivery of water to this right is subject to the procedures described in the United States Bureau of Reclamation spaceholder contracts, as amended in connection with the Palisades project and Minidoka project (attached hereto).

SWC's *Joint Motion*, at 2.⁵

⁵The SWC attached to its *Joint Motion* as Exhibit I the proposed attachment to the partial decrees referenced in their second proposed remark. The seven page document covers 1) Winter Water Savings, 2) Exchange Between Jackson

Amicus Curiae

On June 22, 2012, the Black Canyon Irrigation District, New York Irrigation District, Pioneer irrigation District and Boise Board of Control were granted leave to file their *Motion for Leave to File Amicus Brief: State of Idaho's Motion Concerning "Refill" of Bureau of Reclamation Storage Rights*.⁶ The Amici joined with BOR and SWC in opposing the inclusion of a remark subordinating water entering Bureau facilities after an initial paper fill to all existing and future water rights. They wrote:

The State of Idaho . . . posed the following question concerning the refill issue.

Under what circumstances may storage space in the American Falls and Palisades Reservoirs be 'refilled,' that is, under what circumstances may the cumulative quantities of water stored in the Reservoirs exceed the quantity elements of the storage water rights [footnote omitted]?

While the State's question is limited in scope to Reclamation's storage rights in Palisades and American Falls reservoirs, the arguments advocated by the State to support its position that once a reservoir has technically filled once to its maximum capacity, regardless of whether the water is actually stored or released for flood control purposes, then the reservoir may nevertheless not "refill" in priority with the underlying storage right, could apply to any storage rights held by Reclamation in any reservoir in the State of Idaho.

. . .

Such a remark is not supported by the law or policy of the State of Idaho, nor is it supported by the historical administration of all Reclamation facilities in the State of Idaho.

Amicus Brief, at 4 and 8.

Ground Water Districts' Response

The Ground Water Districts ("GWD")⁷ filed their *Response to the Surface Water Coalition's Joint Motion for Partial Summary Judgment* on June 8, 2012. Their position is simple: they were not parties to the *Eagle Decrees* and thus are not bound by the terms. They argued any attempt by the SWC "to bind junior users to private contractual provisions should be

Lake and American Falls Reservoir, 3) Temporary Upstream Storage, 4) Minidoka Irrigation District Exchange/Storage and 5) Delivery of Water/Measurement/Storage Provisions.

⁶ Also see the June 27, 2012 *Order Clarifying Order on Amicus Motions* holding "the Amici shall not make further filings in these subcases as amicus curiae and the State shall not respond any further to their *Amicus Brief* or *Response*."

⁷ GWD includes: Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Magic Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District and North Snake Ground Water District.

denied because the provisions are not necessary for the definition or administration of the water rights." GWD's *Response*, at 1-2.

United States' Response

The U.S. filed its *Response to SWC's Motion for Partial Summary Judgment* on June 8, 2012. Though it did not file its own motion for partial summary judgment, it suggested SWC's 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." U.S. *Response*, at 3.

The remarks failed to accurately capture the requirements of all the Spaceholder Contracts and they failed to provide clarity:

A more general reference to the contract requirements . . . 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 [footnote omitted].

U.S. *Response*, at 5.

To avoid problems inherent in both the Director's and the SWC's proposed remarks, the U.S. suggested the following remarks to address the permanent and Minidoka Irrigation District exchanges:

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.

U.S. *Response*, at 9.

Finally, the U.S. suggested no remark is necessary or appropriate to address the use of water by the Michaud Division of the Fort Hall Indian Reservation because the 1957 Michaud

Agreement "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." U.S. *Response*, at 11.

Fremont-Madison Response

Fremont-Madison filed its *Response to Surface Water Coalition's Joint Motion for Partial Summary Judgment* on June 8, 2012. They agreed with the State's statement of issues and arguments.

State's Response

The State filed its *Response to Surface Water Coalition's Joint Motion for Partial Summary Judgment* on June 8, 2012. It argued the SRBA Court should deny the *Joint Motion* for the same reasons set forth in prior decisions "and also because the 'administrative provisions' of the Palisades Contracts deal exclusively with the allocation and distribution of stored water, not with the administration of the water rights to divert natural flow into the American Falls and Palisades reservoirs." State's *Response*, at 5. The State added the *Joint Motion* is an attempt to have provisions of federal storage Spaceholder Contracts decreed as administrative provisions binding on all water users.

State's Reply

The final filing by the State in this matter – its 61 page *Reply in Support of State of Idaho's Motion for Partial Summary Judgment* filed on June 29, 2012 – reviews virtually all issues. Regarding Pocatello's argument the Idaho Supreme Court decision in *Pioneer* is controlling legal authority only in relation to irrigation rights and interests, the State argued:

The *Pioneer* rule is based upon beneficial use principles, which are not limited to irrigation uses. Thus, the plain language of the *Pioneer* rule confirms it is controlling authority for the City's claim.

It follows that the City's separate claim to ownership of the Palisades water right [01-2068Y] must be dismissed, just as the competing ownership claims were dismissed in *Pioneer*.

...

The only remaining question is whether the City holds an interest in the Palisades water right under the *Pioneer* rule, which the State's *Motion* does not seek to resolve.

State's *Reply*, at 2-3.

The State then restated many of its earlier arguments. Partial decrees for American Falls and Palisades Reservoirs should not include any reference to the *Eagle Decrees* because they neither adjudicated water rights nor any administrative provisions; hence, the *Decrees* provide no meaningful guidance regarding storage water rights.

The State argued BOR's suggestion that its proposed remarks are harmless because they merely provide notice of the existence of the Placeholder Contracts must be rejected:

Partial decrees represent enforceable property interests and legal rights. They are not bulletin boards and should not be casually decreed as a convenient means to "provide notice." Incorporating the Bureau's remarks into the partial decrees will elevate purely private contractual interests to the level of an interest in a state law-based water right, binding the Watermaster, IDWR and all other water users to those private agreements.

State's *Reply*, at 10.

The State wrote that "the principal purpose of the State's *Motion* is to resolve a dispute over a threshold question of law: whether or not there is a specific, quantifiable, and legally enforceable limit on the amount of water that may be diverted in priority under the American Falls and Palisades water rights." State's *Reply*, at 13.

The State said Idaho law requires that water rights be decreed with a specific and enforceable limit on the quantity that may be diverted in priority: "The legal rule that priority diversions are limited to the decreed 'quantity' necessarily means that further diversions are not entitled to priority and permissible only if they do not injure other water rights . . . [emphasis in original]." State's *Reply*, at 17.

The State argued the SWC's claim of a priority right to ongoing "physical fill" of a reservoir is an unquantified right and contrary to Idaho law and would effectively "federalize" the Upper Snake River. The State reasoned as follows: American Falls and Palisades Reservoirs are federal projects, their operations are governed by federal law and the State has no authority over *releases*. Since releases create available reservoir space, the SWC's "physical fill" theory effectively removes BOR's water rights from priority regulation:

The quantity of water released, rather than the quantity diverted, becomes the measure of the right to divert in priority – and the basis for curtailing junior water users. The fact that federal law governs releases American Falls and Palisades thus means federal law would govern priority diversions as well.

State's *Reply*, at 25.

The State assured the parties its *Motion* does not suggest a "one-fill rule:"

The term "one-fill rule" suggests a prohibition against physically filling a reservoir more than once in a season, something the State's *Motion* does not address or prohibit. The State's *Motion* addresses the question of the quantity that may be diverted in priority, and would not bar the Bureau from physically filling or "refilling" the reservoir. It would simply prevent the Bureau from curtailing juniors once it has diverted the decreed annual volume recited in the "quantity" element.

State's *Reply*, at 26-27, fn 26.

The State suggested the SWC's "paper fill" arguments would undermine Idaho's prior appropriation principles by asserting the American Falls and Palisades water rights are priority entitlements to continuous "physical fill" of the reservoir space:

While the Coalition's assaults on "paper fill" and the "accounting program" are relentless and permeate its brief, all these arguments fail as a matter of law for one reason: they are predicated on the Coalition's flawed assertion that American Falls and Palisades water rights include a priority entitlement to keep the reservoirs perpetually full, regardless of how much water has been diverted to ensure this "physical fill" . . . [T]his contention flies in the face of one of the most basic precepts of Idaho water law: that a water right must be defined "in terms of quantity of water per year" which is essential to the establishment and granting of a water right [citation omitted].

...
"Paper fill" is simply a term that describes this fundamental principle of prior appropriation as implemented in the accounting program. A reservoir water right has filled "on paper" means the annual volume limit on priority diversions has been reached, and therefore the right is no longer in priority [footnotes omitted].

...
The water right accounting program was never intended as tracking systems to monitor reservoir contents, but rather to account for annual flow diversions in accordance with Idaho law.

State's *Reply*, at 28-29.

When the SWC and BOR argued the BOR has discretion to *not* exercise its water rights and allow natural flows to simply pass through the reservoirs for operational purposes, the State wrote such argument ignores reality. In fact, BOR has no discretion over the exercise of its right to divert natural flows into the reservoirs because by design, the dams divert the entire flow of the river and therefore such inflows must be counted toward the annual fill that may be diverted in priority: "Idaho law thus requires that all of the inflow actually diverted into the American Falls and Palisades reservoirs under their priorities be counted towards the annual volume limit [emphasis in original]." State's *Reply*, at 34.

The State pointed out that legal authority for BOR to release water for operational purposes such as flood control is based on federal law and the Spaceholder Contracts, not State law. Necessarily "the quantity of a priority right is . . . measured by diversions, not releases." State's *Reply*, at 36. When the spaceholders signed the contracts, they were aware that in some years the reservoirs would not physically fill as a result of flood control releases: "The contracts between the Bureau and the spaceholders expressly recognize this fact and allocate the risk of such shortfalls among the reservoirs and the spaceholders." State's *Reply*, at 37.

The State suggested the SWC's arguments for a physical fill "would shift this risk to junior water right holders who were not parties to the contracts by allowing flood control releases to effectively enlarge the annual volume that may be diverted in priority under the American Falls and Palisades water rights." State's *Reply*, at 37-38.

When the SWC argued American Falls and Palisades water rights are entitled to priority refill based on historic practice, the State wrote: "Thus, even if it were assumed, *arguendo*, that historically the American Falls or Palisades reservoirs had consistently 'refilled' under their licensed priorities (which they have not), that fact would be insufficient as a matter of law to validate such a practice through an SRBA decree." State's *Reply*, at 44, citing former SRBA Presiding Judge John M. Melanson's July 1, 2008 ***Order Deconsolidating Subcase 00-92026*** holding that historical practices do not constitute a separate legal basis for modifying existing rights and requiring that the historical method of administration be continued.

The State then argued both reservoir water rights have been administered consistently with the State's *Motion* since at least 1970 and American Falls was not refilled in priority for 40 years before then as alleged by the SWC. See State's *Reply*, at 44-52.

Ground Water Districts' Reply

The GWD filed their *Reply in Support of State's Motion for Partial Summary Judgment* on June 29, 2012. They are "supportive of the State's position that Water District 1 continue to operate under the one-time-refill rule but allow for the continued practice off an in-season refill that is not in accordance with the priority of the underlying water right. . . ." GWD *Reply*, at 3.

Surface Water Coalition's Reply

The SWC lodged their *Reply Brief in Support of Joint Motion for Partial Summary Judgment* on June 29, 2012. They agree with BOR's proposed remarks for administration of the Temporary Upstream, Permanent and Minidoka Irrigation District storage exchanges. They also prefer BOR's proposed remarks addressing the Spaceholder Contracts and *Eagle Decree* over the remark recommended by IDWR. In addition, the SWC maintains the proposed remarks are necessary for administering both American Falls and Palisades Reservoir rights.

Fremont-Madison Reply

Fremont-Madison filed its *Reply in Support of State's Motion for Partial Summary Judgment* on June 29, 2012. They "support an in-season refill that is not in accordance with the priority of the underlying water right as has been explained in detail by Tony Olenichak [Water District 01 Program Manager]." Fremont-Madison's *Reply*, at 1.

Hearing on Motions for Partial Summary Judgment

A hearing on *Motions for Partial Summary Judgment* filed by the State and SWC was held on July 12, 2012, at the SRBA Courthouse in Twin Falls, Idaho. David W. Gehlert appeared for the United States of America, along with Matt Howard and Gail McGarry; Michael C. Orr appeared for the State of Idaho, along with Ann Y. Vonde; Travis L. Thompson, Paul L. Arrington, W. Kent Fletcher and C. Tom Arkoosh appeared for the Surface Water Coalition; Josephine P. Beeman appeared for the City of Pocatello; Hyrum D. Erickson appeared for the Fremont-Madison Irrigation District, Idaho Irrigation District and Blackfoot Irrigation Company; Candice M. McHugh appeared for the Ground Water Districts, along with Becky Harvey; and Chris M. Bromley and Nicholas B. Spencer appeared for IDWR, along with Tony Olenichak.

DISCUSSION

Author Mark Fiege wrote about conflict, cooperation and allocation on the Upper Snake River in his book, *Irrigated Eden, the Making of an Agricultural Landscape in the American West* (University of Washington Press, 1999). Chapter 3 begins with a history of how water was divided beginning with a fatal ditch bank duel on Corbett Slough in the upper Snake River valley between Joe Koury and William Grover in July, 1919. After recalling later troubles of

differentiating stored water from the regular, or natural flow, of a hydrologically complicated river, Mark Fiege noted the irrigators' solutions:

[To settle such conflicts,] a social solution based on informal, cooperative allocation methods seemed the answer. This cooperation, which culminated in the creation of the Snake River Committee of Nine in 1923, combined all elements of water management – prior appropriation, dams, reservoirs, irrigation companies and districts, state and federal agencies, the river itself – into one loose, composite system. Snake River irrigators hoped that this ad hoc cooperative organization would prevent the sort of conflict that led to farmers bludgeoning each other with shovels.

...
The irrigators did not actually solve the technical problem of distributing water: they did not discover a means to divide the Snake into quantities that exactly corresponded to water rights. Instead, the arrangements they established reflected political compromises as much as expertise in hydrology.

...
Most important to the formation of cooperative practices was the encounter between irrigators and the river itself. The irrigators simply had no easy means to transform the Snake into precise quantities flowing onto the fields of individual farms. Hydrological conditions were too complex and erratic, and the opportunities for disagreements, conflict and violence too great. The irrigators could achieve their objective only by fashioning methods and organizations that allowed them collectively to negotiate the movement of water from its uncontrolled state to its final destination in their fields.

Fiege, *Irrigated Eden*, at 85, 111 and 116.

The two BOR irrigation storage claims to American Falls and Palisades Reservoirs confront the same issues faced by irrigators in 1919 – differentiating stored water from natural flows – only this time the main combatants are the United States, the State, large groups of irrigators and even a city with a population of over 54,000. It should be no surprise that Snake River hydrologic conditions remain complex and erratic even after construction of large storage facilities and today's combatants still seek ways to avoid conflicts.

IDWR and the parties have offered various remarks to be included with both American Falls and Palisades Reservoir partial decrees "as are 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). In the end, each proposed remark reflects an honest effort to add certainty and avoid future conflicts:

1. IDWR's recommended remark states the delivery of water *may* be subject to procedures described in Spaceholder Contracts described in the *Eagle Decrees*, plus natural flow and storage deliveries calculated by IDWR.⁸
2. The BOR suggested a remark stating each right includes the right to refill under the priority date of the water right – 1921 or 1939 – to satisfy its storage contracts.
3. The State offered a refill remark stating the right is filled when the total quantity accumulated equals the decreed quantity; additional stored water is subordinate to all existing and future water rights.
4. The SWC suggested two alternative remarks. The first included reference to specific portions of the Spaceholder Contracts incorporated in the *Eagle Decrees*. Their alternative remark does not mention the *Eagle Decrees* but references the Spaceholder Contracts and includes seven pages of attachments entitled: "Winter Water Savings, Exchange Between Jackson Lake and American Falls Reservoir, Temporary Upstream Storage, Minidoka Irrigation District Exchange/Storage and Delivery of Water/Measurement/Storage Provisions."
5. The United States suggested two of its own remarks referencing contracts – one covering American Falls Reservoir only and the other for both reservoirs.

Pocatello's Equitable / Beneficial Use Claim

The first issue raised by the State in its *Motion for Partial Summary Judgment* concerns whether Pocatello's ownership interest in Palisades Reservoir has been determined. It argued *Pioneer* effectively disallowed Pocatello's claim of any ownership interest to a storage right in the reservoir. Fremont-Madison agreed as did the U.S., but the parties – except Pocatello – agreed to stay all competing irrigation storage claims pending resolution of Pocatello's objections in the Palisades Reservoir subcases. As the United States wrote, how *Pioneer* applies to Pocatello will have to be determined in subsequent proceedings. Hence, a determination of the State's first issue will be stayed for now.

⁸ The Director's recommendations have not been amended since they were filed; however, in light of the record to date, the Director's recommended remark concerning Spaceholder Contracts and the *Eagle Decrees* is no longer entitled to *prima facie* weight under I.C. § 42-1411(4) and (5). At one point, the SWC disagreed with that.

Eagle Decrees and Spaceholder Contracts

The State's second issue concerns whether partial decrees for storage water rights in both reservoirs should include references to the 1968 and 1969 *Eagle Decrees*. The SWC's *Motion for Partial Summary Judgment* addressed essentially the same issue since the *Eagle Decrees* "ratified, confirmed and approved" the Spaceholder Contracts.

The State wanted no references to the *Eagle Decrees* because they "are not binding on the State or the United States Bureau of Reclamation ('Bureau'), did not adjudicate any water rights or administrative provisions, and that the 'common plan' consists of little more than an agreement among spaceholders to be bound by each others' contracts with the Bureau." The U.S., Fremont-Madison and the GWD agreed with the State.

The SWC argued in favor of including Spaceholder Contract remarks because those contracts established an administrative scheme for the Upper Snake River Reservoir System that is binding on all parties to the agreements as well as all junior water users and the remarks are necessary for administration of the rights. The U.S. agreed to inclusion of some Spaceholder Contract provisions, but no *Eagle Decree* remark.

At the hearing on the *Motions for Partial Summary Judgment*, it was clear the *Eagle Decrees* did nothing more than ratify, confirm and approve the Spaceholder Contracts that actually govern operation of American Falls and Palisades Reservoirs and delivery of their stored water. It should be no surprise then that when a question arises, the parties will look to the contracts for administration of the rights, not the *Eagle Decrees*. Reference to the *Eagle Decrees* in this Court's partial decrees for irrigation storage rights will add nothing but confusion, especially if and when the contracts are amended.

The same reasoning applies to including references to Spaceholder Contracts in the partial decrees. Regardless of whether such remarks are included in the partial decrees, parties to the contracts will look to the contracts themselves, not the partial decrees. If the contracts are subsequently amended, there will be no need to amend the partial decrees. And there will be no dispute because some provisions of the contracts are included in the partial decrees while others are omitted – in that event, the contracts themselves govern. The last things the parties and IDWR need in these subcases are more layers of documents to consider.

Refill

The third issue raised by the State is whether partial decrees for both irrigation storage rights should include the State's refill remark which it asserts is necessary to define and/or efficiently administer the rights. The licenses for American Falls and Palisades Reservoirs contained no such remark and the SWC correctly pointed out the State has no one-fill rule. In fact, there are no settled definitions of fill or refill for reservoirs.

In these subcases, the issue arose after IDWR amended its accounting program to measure stored quantities, all without direction from the courts or legislature. As the U.S. noted, "the State is attempting to use summary proceedings to impose a remark upon the United States' American Falls and Palisades storage right which would decree a portion of the complex system used for administration and accounting of those rights." In that light, concerns raised by the Amicus Curiae are well made: if the State's suggested refill remark merely describes present state water law, the same remark could apply to any storage right held by Reclamation in any reservoir in the state whether stated in the license or not.

The important conclusion in these subcases is that any remark that merely restates Idaho water law is not necessary to define, clarify or administer irrigation storage rights, especially where there are variations between reservoirs and their licenses. Clear definitions of the words fill and refill in the context of reservoir storage is best left to legislators. As Mark Fiege suggested, such definitions will likely reflect political compromises as much as expertise in hydrology.

CONCLUSIONS OF LAW

1. The issue of whether *Pioneer* disallowed Pocatello's ownership interest to a storage right in Palisades Reservoir should be considered in later proceedings.
2. References to the *Eagle Decrees* or Spaceholder Contracts are **not** necessary for definition, clarification or administration of the American Falls or Palisades Reservoir irrigation storage rights.
3. The State's refill remark is not necessary to define and/or efficiently administer the American Falls and Palisades Reservoir irrigation storage rights.

ORDER

THEREFORE, IT IS ORDERED that the State's and the SWC's *Motions for Partial Summary Judgment* are **denied**.

DATED July 27, 2012.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

AMERICAN FALLS AND PALISADES RESERVOIRS

Subcase Nos:

01-02064
01-02064A
01-02064B
01-02064C
01-02064D
01-02064E
01-02064F
01-02064L
01-02068
01-02068D
01-02068E
01-02068F
01-02068M
01-02068Y
01-10042
01-10042A
01-10042B
01-10043
01-10043A
01-10043E
01-10053A
01-10190
01-10191
01-10389

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