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**THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Nos. 1-217, 1-218, 1-4024, and 1-4025
	)	(Minidoka Power Rights)
	)	
Case No. 39576	)	Subcase Nos. 1-2068 and 1-4054
	)	(Palisades Power Rights)
	)	
	)	SURFACE WATER COALITION'S JOINT
	)	MOTION TO ALTER OR AMEND
	)	

COMES NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Falls Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (the "Coalition"), by and through counsel of record and pursuant to Administrative Order #1 ("AO1") 13(A), and hereby submits this *Joint Motion to Alter or Amend* the Court's March 25, 2010 *Order Granting Motions for Summary Judgment and Special Master Report & Partial Recommendation* (the "Order").

INTRODUCTION

Simply stated, the issue before the Special Master in these subcases is the force and effect that should be given to a prior decree – here, the *Eagle Decree*. In light of recent decisions from this Special Master, the answer to this question seems clear. For example, this Special Master recently held that the Director is bound to administer water pursuant to a prior decree – even if that decree derives from a private adjudication. *Special Master Report & Recommendation*, Subcase Nos. 01-209 *et al* (Feb. 2, 2010) (Minidoka Credit Remark) (“the State Engineer was bound to enforce the terms of the *Foster Decree*”). In his *Order on Motions for Summary Judgment & Order Setting Status Conference*, Subcase No. 01-14 *et. al.* (Junior Natural Flow Subcases) (Nov. 9, 2009), this Special Master held that parties developing water rights after the *Eagle Decree* are bound by its terms. There, this Special Master affirmed the *Eagle Decree*’s priority dates and source determinations – thereby rejecting the junior ground water users’ attempts to rewrite the *Eagle Decree* by establishing subordination provisions that were not included in the *Eagle Decree*. In the Minidoka Credit Remark decision, at page 9, this Special Master specifically held that the junior ground water users “are bound by the *Foster Decree*.”

Notwithstanding this clear precedent, the *Order* overlooked the “common plan of administration” established by the Palisades Contracts and incorporated into the *Eagle Decree* and held that neither the State nor the Bureau of Reclamation (“Bureau”) are bound by the *Eagle Decree*, the Palisades Contracts or the common plan established therein. Instead of refusing to expand or create subordination as in the Junior Natural Flow Subcases, the *Order* significantly expands the subordination of the decreed and licensed rights far beyond the intents of the original contracting parties. In short, the *Order* is inconsistent with law of the SRBA and the history of administration in Basin 01.

This conclusion threatens one vital element of the common plan – the power loss payment program. Under this program, an agreement was made to *voluntarily* subordinate the power rights to irrigation storage in order to increase irrigation storage in the reservoir system. Importantly, at the time these rights were developed and decreed, the law did not allow the State to subordinate water rights. Those who benefited from the resulting increase in irrigation storage were then required to help defray the increased cost of electricity to those who relied on the inexpensive winter power generation that would no longer be available. The *Order*, however, threatens to expand this subordination without any consideration for the power loss payment program agreed to by the spaceholders and Bureau and “ratified, confirmed and approved” by the *Eagle Decree*. Accordingly, the *Order* should be amended to correct these errors.

STANDARD OF REVIEW

Administrative Order #1 provides for motions to alter or amend. AO1 13(A). The standard of review for a motion to alter or amend was set forth in the *Order On Motion to Alter or Amend the Special Master’s Recommendation*, Subcase Nos. 65-20033, *et al.* (Apr. 27, 2000). There, at page 2-3, the Special Master described the standard of review as follows:

Motions to alter or amend, are provided for in Paragraph 13, AO1. While not identical, a motion to alter or amend in AO1, is similar to a motion under Rule 59 (e), I.R.C.P. The case history on Rule 59(e) I.R.C.P. sets the appropriate standard and rationale for Paragraph 13, AO1. A Rule 59(e) motion to alter or amend a judgment [special master’s recommendation] is addressed to the discretion of the court [special master]. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030 (1982).(brackets added.)

Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered its decision upon which the judgment is based.

Id. at 263 (citations omitted).

ARGUMENT

I. The State of Idaho and United States are Bound by the *Eagle Decree*.

In the *Order*, the Special Master determined that:

The argument was made that the State and United States are bound by the *Eagle Decrees*. The answers are simple. The State is not bound because it was not a party and Water District 01 Watermaster Henry Eagle, as USGS employee at the time, lacked authority to bind the State in its sovereign capacity. Neither is the United States bound because it, too, was not a party and proceedings before Judge Ward and Judge Burton were private water adjudications binding only the parties – not a McCarran Amendment adjudication.

This conclusion is contrary to law.

The Coalition thoroughly explained why the State and Bureau are bound by the *Eagle Decree* in Part V of the *Joint Opposition to State & U.S. Motions for Summary Judgment*. Those arguments will not be restated herein, but are incorporated into this *Motion to Alter or Amend*.

The State of Idaho, through the Director and local watermasters, is charged with administering water rights. The law on this point is clear. *See* Idaho Code §§ 42-602 & 42-607. These statutes govern a watermaster's duties in "clear and unambiguous terms." *R.T. Nahas Co. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988). The Director's obligation to administer water rights within a water district is a "clear legal duty." *Musser v. Higginson*, 125 Idaho 392, 395 (1994). In times of shortage, watermasters must distribute water according to the elements of an "adjudication or decree." *State v. Nelson*, 131 Idaho 12, 16 (1998); *see also Crow v. Carlson*, 107 Idaho 461, 465 (1984) ("The [] decree is conclusive proof of diversion of the water, and of application of the water to a beneficial use").

A watermaster's duty to administer water rights according to the plain terms of a decree has been in place for over a century:

We think the position is correct, and we are also satisfied that in a case like this where the decree upon its face is explicit as to the stream from which the waters are to be distributed, that the water-master cannot be required to look beyond the decree itself.

Stethem v. Skinner, 11 Idaho 374, 379 (1905). In fact, as this Special Master recently confirmed, this obligation extends to private adjudications. See *Minidoka Credit Remark Order*, *supra*. Finally, as it specifically relates to the *Eagle Decree*, the law requires that “water shall be distributed to the claimant in accordance” with the supplemental decree. Idaho Code § 42-1424.

Importantly, the *Order* makes no mention of this “clear legal duty.” Rather, the *Order* concludes that the State is not bound by the decrees, as if the State of Idaho could somehow now avoid or ignore the obligations of a watermaster who is bound by a prior judgment. In light of the “clear and unambiguous” law requiring the State and watermasters to administer to the decrees, this conclusion cannot stand.

Likewise, even if the Bureau was not bound by the *Eagle Decree* because it was not a party, it is bound by the *Foster Decree*, to which it was a party. Importantly, the *Foster Decree* adjudicated the Bureau’s water rights without subordination. In fact, at the time, the law did not allow the State to subordinate the rights. See *infra*. As such, these rights were not subordinated until later, when, through the Palisades Contracts, the Bureau and space holders voluntarily agreed to subordinate the power rights to irrigation storage. As a party to the Palisades Contracts, the Bureau is bound by their terms. Therefore, even though it was not a party to the *Eagle Decree*, the Bureau is bound by the *Foster Decree* and Palisades Contracts.

The *Eagle Decree* simply reaffirmed the *Foster Decree*, Idaho Code § 42-1424, and “ratified, confirmed and approved” the Palisades Contracts, *Order* at 11. The *Eagle Decree* did not alter any of the rights or obligations in the *Foster Decree* or the Palisades Contracts. As such, it did not alter any of the Bureau’s obligations with respect to the Minidoka power rights.

The *Eagle Decree* did not create any new rights in any water users as it relates to the Bureau's *Foster Decree* water rights. Rather, the *Eagle Decree* simply reaffirmed the Bureau's prior rights and obligations as established in the prior adjudications and contracts. Accordingly, the Special Master's conclusion that the Bureau is not bound by the *Eagle Decree* because it was not a McCarran Amendment adjudication misses the point. The Bureau is bound because it was a party to the *Foster Decree* and because it voluntarily entered into the Palisades Contracts. Now, the Bureau seeks to avoid those obligations through an agreed upon remark with the State of Idaho that expands the subordination of its power rights to the detriment of the end users of the power generated at the Bureau's facilities, those irrigation districts that rely upon reserved power. The law does not allow for such actions.

The *Order* wrongly concludes that the State is not bound by the *Eagle Decree*. The *Order* also fails to clarify that the Bureau is bound by the terms of the *Foster Decree* and the Palisades Contracts, both of which were ratified, confirmed and approved in the *Eagle Decree*. The *Order* should be amended accordingly.

II. The *Eagle Decree* Established a "Common Plan of Administration."

The Palisades Contracts, as "ratified, confirmed and approved" by the *Eagle Decree*, established a "common plan" for the administration of water rights along the Snake River. *See Joint Opposition* Parts II & III.a. The plain language of the *Eagle Decree* confirmed this fact. *Order* at 11 (quoting the *Eagle Decree*) ("the Palisades Contracts 'as the same have been amended and modified, in connection with the Palisades project and other projects, were intended to be, and are, binding upon all persons claiming rights to the use of the waters of the Snake River ... and *constitute a common plan for the administration of the Snake River*'") (emphasis added). The Special Master recognizes this fact. *Order* at 11 (finding that the *Eagle*

Decree “judges agreed with the parties that the Contracts were 1) binding on all parties and 2) ***constitute a common plan for administration of the Snake River above Milner Dam***”)

(emphasis added). Even the Bureau’s attorney recognized that Palisades Reservoir would not have been a reality without a “system that would provide enough water.” As the Bureau’s attorney stated in oral argument on these motions:

Congress doesn’t build new reservoirs unless they know they have the water to fill them. And that was the issue with Palisades, there wasn’t enough water to fill the reservoir and they went out and they ***negotiated with the irrigation districts and other water right holders to create a system that would provide enough water.***¹ (Emphasis added)

Remarkably, however, the State and Bureau seek to undo this “common plan” (or “system” as the Bureau’s attorney references it) by bifurcating the elements of the plan and attacking them individually in separate subcases. The power loss payment program constitutes a vital part of the “common plan” for administration of the *Eagle Decree* water rights and was the consideration received for the subordination of power rights to irrigation storage. The only grounds for any claim of subordination are the power loss payment program and subordination to ***irrigation storage*** set forth in the Palisades Contracts.

When Palisades was being planned, the ability to fill Palisades with storage water was a major concern. If senior power rights at Minidoka Dam were filled each year, it was unlikely that Palisades would have significant storage water, since the water to generate power would have to bypass Palisades Dam when Palisades Reservoir could otherwise be filling. Under this “common plan” set forth in the *Eagle Decree*, parties to the Palisades Contracts, including the Bureau, recognized this issue and sought ways to increase storage for irrigation. This necessarily required a shift in some of the historical irrigation and management practices of the canal

¹ A copy of the oral argument for the hearing on summary judgment, held November 12, 2009, was acquired from the SRBA Clerk’s office.

company and irrigation districts throughout the Snake River plain. For example, under the winter water savings agreements, entities agreed to discontinue the practice of running water through their canals during the winter months, a practice that had occurred since the creation of the projects, in exchange for a more senior storage right at Palisades. This allowed the Bureau to store more water in the reservoirs and, as such, preserve more water for irrigation during the summer.

Another vital part of the “common plan” is the power loss payment program at issue here. The agreed upon power loss payment program requires the Bureau to reduce winter power generation at the power plants – thereby resulting in more storage water for irrigation purposes. Water would be left in the reservoirs system to increase the ability to fill irrigation storage rights – including junior storage rights. Leaving more water in the reservoir system resulted in a reduction in power generation during the winter months.

Importantly, long before the construction of Palisades Reservoir, many of the irrigation entities relied on the inexpensive power generated at the Bureau power plants in the winter as a means of reducing their costs of operation. If the Bureau reduced the generation of power in the winter in order to fill Palisades Reservoir, the loss of revenue from winter power generation threatened to increase the cost of operating their irrigation systems. In order to obtain the consent of space holders to the reduction of winter power generation, the power loss payment program was created. Under this program, space holders gaining a benefit from the increased storage for irrigation during the winter months would be required to help defray the resulting loss of winter power generation and increased power rates by paying a surcharge to those whose inexpensive power supplies were diminished as a result of the increased storage. This allowed

the space holders entitled to power from the Bureau facilities to maintain their reduced costs of operation.

This “common plan” is set forth in the Palisades Contracts, signed by the Bureau, and subsequently “ratified, confirmed and approved” by the *Eagle Decree*. *Order* at 11. According to the *Eagle Decree*, this “common plan” was “***binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam.***” *Id.* (emphasis added). Confusingly, however, the Special Master has determined that, although “both judges agreed with the parties that the Contracts ... constitute a common plan for administration” and although both judges “ratified, confirmed and approve” this common plan, the common plan is not binding on the State and the Bureau. *Order* at 11-12. This conclusion is wrong as a matter of law, since, as stated above, the State is bound to administer to the *Eagle Decree* and the Bureau is bound by the *Foster Decree* and Palisades Contracts, which were affirmed by the *Eagle Decree*.

The Court cannot overlook the “common plan for administration of the Snake River above Milner Dam.” *Order* at 11. The Court cannot overlook the explicit wording of the Palisades Contracts and the consideration granted for subordinating power rights to irrigation storage. As such, the *Order* should be amended to be consistent with the law, the *Foster Decree*, the *Eagle Decree* and the Palisades Contracts.

III. The *Order* Expands the Rights to Which the *Eagle Decree* Rights are Subordinated.

The *Order*, at 12, claims that “all seem to agree that no one wants to change the decades-long administration of the Snake River and no one wants the Palisades Contracts to be re-written.” Further, the “Special Master agrees with the United States’ argument that the proposed

remarks do not amend the Palisades Contracts which everyone agrees remain in force.” *Id.* at 13.

During oral argument, the Bureau’s attorney made the following statement:

Whether the remark includes irrigation or not, does not make a bit of difference because maximizing storage generally is exactly the same thing as maximizing storage for irrigation.

These arguments, however, are defeated by the plain language of the *Order* and the comments approved by the *Order*, which seek to greatly expand the extent of subordination of the above power rights.

Water rights 1-217 and 1-218 were originally decreed in the 1913 *Foster Decree*. As decreed, these water rights were not subordinated in any fashion. Indeed, at that time, the Constitution did not allow for such subordination:

Sec. 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, ***shall never be denied***. Priority of appropriation shall give the better right as between those using the water ...

P.U.C. v. Natatorium Co., 36 Idaho 287 (1922) (*quoting* IDAHO CONST. art. VX, § 3). This provision was amended in 1928 to read: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.” *Fremont Madison Irr. Dist. & Mitigation Group v. IGWA*, 129 Idaho 454, 455 (1996) (emphasis added). In other words, when decreed, the Constitution did not permit the State to subordinate the Bureau’s water rights at Minidoka Dam. Likewise, absent clear language, the State has no authority to retroactively apply the law and diminish these water rights. *E.g.* Idaho Code § 73-101 (“No part of these compiled laws is retroactive, unless expressly so declared”); *Gailey v. Jerome Cty.*, 113 Idaho 430, 433 (1987) (“In the absence of an express declaration of legislative intent that a statute apply retroactively, it will not be so applied”).

Subsequently, with the construction of Palisades Reservoir, the Bureau and space holder voluntarily agreed to subordinate the power rights. Pursuant to the power loss payment program, power rights are subordinated to irrigation storage rights in the reservoir system. Under this program, water would be allowed to fill irrigation storage space during the winter months instead of being run past the dams for power generation. Importantly, under the Palisades Contracts, **this voluntary subordination was only to irrigation storage.**

However, without explanation and without any legal support, the *Order*, at 12, states that “power generation at the Minidoka power plant may be curtailed to benefit storage of water for irrigation **and other purposes**, regardless of the power loss payment system relied upon by the districts.” (Emphasis added). In addition, the proposed remark removes reference to “irrigation” storage. The end result of these changes drastically alters the consideration granted by the space holders when they agreed to subordinate power rights only to irrigation storage and vastly expands the subordination of the power rights. In short, removing the word “irrigation” from the proposed remark will allow for additional uses that “go beyond” the *Eagle Decree*. See Ex. C. to *Fletcher Aff.* (Tuthill Depo. at 62-63; 121-23). The *Order* expands the subordination of the power rights, goes beyond the *Eagle Decree*, and is contrary to the Special Master’s stated intention “that the proposed remarks do not amend the Palisades Contracts which everyone agrees remain in force.” *Order* at 11. Furthermore, in light of the State’s lack of authority to subordinate the Bureau’s *Foster Decree* rights when they were decreed, any attempt to expand the voluntary subordination in the Palisades Contract would constitute a takings.

During oral argument, the Bureau’s attorney attempted to justify the proposed remark by arguing that either with or without the word “irrigation” the “remarks mean exactly the same thing.” It is unclear, therefore, why the Bureau is so opposed to keeping the word “irrigation” in

the remark. Even though the *Eagle Decree* has been in place over forty years, at oral argument the Bureau claimed that using the word “irrigation” would create confusion. This argument was made even though the Bureau and space holders included the word “irrigation” in the Palisades Contracts and the Bureau claims that it has managed the storage system in accordance with the Palisades Contracts since their inception. There is nothing in the record to support the position that the word “irrigation” creates confusion and why it should be removed, contrary to the wording of the Palisades Contracts and the *Eagle Decree*.

The Coalition’s concerns were made clear in its briefing and at oral argument: The elimination of the word “irrigation” from the remark will allow for a significant expansion of the agreed upon subordination in the Palisades Contract. For example, without the term “irrigation,” there is nothing to prevent the subordination of these rights to all junior users on the Snake River – regardless of whether they are irrigation storage or not. Should this occur, it is unclear if the irrigators who negotiated the power loss payment program in the Palisades Contract will be able to recover for the lost power production.

Since there is no basis for this expansion of subordination, the *Order* should be amended to be consistent with the *Eagle Decree* and Palisades Contracts.

IV. The Order Attempts to Subordinate the Bureau’s Beneficial Use Claims Without Any Basis in Law.

In submitting its beneficial use claims for water rights 01-4024 and 01-4025, the Bureau did not claim that the rights should be subordinated. These claims, which were made under oath, did not seek any subordination. There is nothing in the law that supports the subordination of a constitutional beneficial use claim. Furthermore, since water right 01-4024 pre-dates the 1928 amendment to the Constitution, which gave the State the right to regulate the appropriation of water rights, *see supra*, the State has no right to attempt to subordinate the water right.

V. The Director Should Have Issued a New Recommendation.

In the *Order*, the Special Master apparently approves of the State's and Director's attempt to circumvent the statutory procedures for recommending and objecting to water rights in the SRBA. Following issuance of the Director's Report, the State and Bureau negotiated a settlement to their objections without the Coalition, who were respondents in these subcases. Since the Coalition refused to sign off on the settlement – which attempted to greatly expand the subordination of the power rights – the State and Bureau filed their motions for summary judgment.

Importantly, as Objectors, it is the State's and Bureau's burden to show that the Director's recommendation is wrong. *See* Idaho Code § 42-1411(4) (recommendation constitutes *prima facie* evidence of the nature and extent of the water rights). What happened here, however, is a deviation from the law and violates due process.

Upon filing its motion, the State identified the former Director and Interim Director as witnesses to testify that the settlement remark was more appropriate than the remark originally recommended. In other words, after the State's and Bureau's negotiations, the Director apparently determined that his original recommendation was incorrect. As such, the Director participated as a witness for one of the Objectors. In addition to being contrary to the plain language of the statute prohibiting the Director from appearing, Idaho Code § 42-1401C, this process allowed the Director to effectively amend his recommendation without providing appropriate notice and opportunity to participate. As a result of this improper procedure, any claimant in the SRBA who may have concerns over the State's and Bureau's attempt to rewrite administration in Basin 01 by expanding the subordination of the Minidoka Power rights did not have an opportunity to object.

The Special Master overlooks this procedural deficiency by dismissing the statutory requirements pertaining to changing a recommendation, due process issues and over-simplifies the concern:

Here, since the Director no longer stands by his original recommended remarks, the Coalition argued they were denied the normal procedures of objecting and responding. It should be evidence the Director's original recommended remarks for these BOR claims are not entitled to *prima facie* weight and the issue is simply a question of proof. But it is equally clear that nothing would be gained by referring the matter back to the Director to amend his recommendations – the current interim Director and his predecessor both support remarks proposed by the State and the United States. The parties have had ample notice and opportunity to pursue their objections.

Order at 11.

First, as a matter of law that the Director's recommendation is entitled to *prima facie* weight. Idaho Code § 42-1411(4). Nothing in the law allows the Special Master to overlook this *prima facie* weight – especially where, as here, the recommendation was never withdrawn by the Director. Under the law, it is the Director's duty to submit a recommendation and advise the SRBA Court as to that recommendation. Idaho Code § 42-1401B. Here, the Director submitted a recommendation and, rather than advising the SRBA Court as to the recommendation, ignored his statutory obligations and participated as a witness for the State in challenging the recommendation. As such, neither the Coalition, nor any other party who disagreed with the Director's new recommendation, was permitted to file an *Objection*.

This new procedure sets a dangerous precedent. By allowing the Director to (1) submit a recommendation and (2) participate as a witness for one of the Objectors who are challenging that recommendation, the Special Master has effectively prevented parties to the SRBA from participating in matters when their agreement with the original recommendation resulted in no objection being filed. Should such parties disagree with the Director's new position, they will

not receive notice of the new position and will not be able to participate. The fact that those who did object or respond to the original recommendation “have had ample notice and opportunity to pursue their objection,” is of no consequence to those who did not object or respond because they agreed with the original recommendation.

This improper procedure cannot be allowed. As such, the *Order* should be set aside and amended recommendations should be issued so that all parties who may desire to participate in these proceedings may have that opportunity.

CONCLUSION

The *Order* fails to properly apply the law and should be reconsidered. Notwithstanding the fact that the State is bound to administer to the *Eagle Decree*, and the Bureau is bound by the Palisades Contracts and *Foster Decree*, the *Order* approves of the State’s and Bureau’s attempts to significantly expand the subordination voluntarily agreed to between the Bureau and space holders. Moreover, the Court cannot approve an agreed to “remark” as a matter of law when the remark was not recommended by IDWR and no party to the SRBA was given the due process and opportunity to object as required by AO1. As such, the *Order* should be amended as discussed above.

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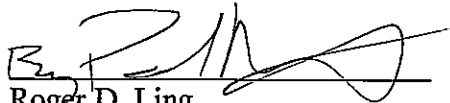
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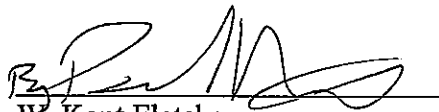
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DATED this 28th day of April, 2010.


Roger D. Ling

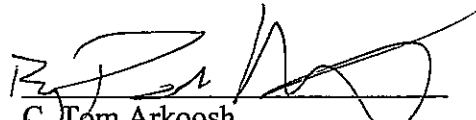
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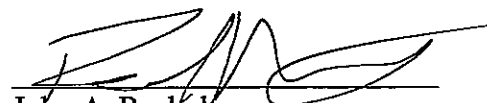
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2010, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S JOINT MOTION TO ALTER OR AMEND** on the following by the method indicated:

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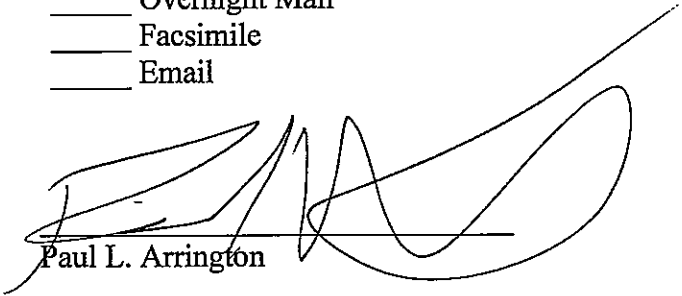
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