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

In Re SRBA

Case No. 39576

)
) Subcase Nos. 01-02064, 01-02064A,
) 01-02064B, 01-02064C, 01-02064D,
) 01-02064E, 01-02064F, 01-02064L,
) 01-10042, 01-10042A, 01-10042B,
) 01-10053A, and 01-10190
) (American Falls Subcases)
)

) Subcase Nos. 01-02068, 01-02068D,
) 01-02068E, 01-02068F, 01-02068M,
) 01-02068Y, 01-10043, 01-10043A,
) 01-10043E, 01-10191, and 01-10389
) (Palisades Subcases)
)

) **MEMORANDUM IN SUPPORT OF**
) **STATE OF IDAHO'S MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
)

INTRODUCTION

The State filed the *State Of Idaho's Motion For Partial Summary Judgment* in these subcases on January 25, 2012 (“*Motion*”), almost five years after the Surface Water Coalition and other parties filed objections raising the issues the State’s *Motion* seeks to resolve. The first count of the *Motion* seeks to establish that the Idaho Supreme Court’s decision in *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007), is the controlling legal authority for resolving the City of Pocatello’s assertion of an ownership interest in the storage water right for Palisades Reservoir. *Pioneer* as a matter of law requires disallowance of the City’s claim for a separate water right in the City’s name, and also that the Palisades storage right be decreed in the name of the United States with the *Pioneer* remark. There is no legal basis for continuing dispute on these points.

The second count of the State’s *Motion* seeks a ruling that the *Eagle Decrees* should not be referenced in the partial decrees for the American Falls and Palisades storage water rights. This question was resolved by the Presiding Judge’s orders of February 9, 2011 and May 17, 2011 in the Minidoka and Palisades power rights subcases,¹ which held that the *Eagle 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. It is not necessary to reference the *Eagle Decrees* in the partial decrees to define, clarify or

¹ *Memorandum Decision And Order On Challenge*, Subcase Nos. 01-217, 01-218, 01-4024, and 01-4025 (*Minidoka Power Rights*) and Subcases Nos. 01-2068 and 01-4054 (*Palisades Power Rights*) (Feb. 9, 2011); and the *Order On Motion To Alter Or Amend Judgment*, I.R.C.P. 59(e), Subcase Nos. 01-217, 01-218, 01-4024, and 01-4025 (*Minidoka Power Rights*) and Subcases Nos. 01-2068 and 01-4054 (*Palisades Power Rights*) (May 17, 2011).

administer the American Falls and Palisades storage rights, and any such references would improperly elevate private contractual arrangements to the status of water rights, putting the Director and/or the Watermaster in the position of resolving private contract disputes among spaceholders.

Finally, the last count of the State's *Motion* seeks a remark in the American Falls and Palisades storage water rights authorizing the Bureau to "refill" storage after it has already filled in a given season, subject to the condition that "refill" is subordinate to all other water rights. While the members of the "Surface Water Coalition"² 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.

FACTS³

The Director recommended in 2006 that the storage water rights for American Falls Reservoir (01-2064) and for Palisades Reservoir (01-2068) be decreed in the name

² The members of the "Surface Water Coalition" are: American Falls Reservoir District No. 2, A&B Irrigation District, Burley Irrigation District, Falls Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, and Minidoka Irrigation District. *Surface Water Coalition's Statement Of Issues/Proposed Trial Schedules* (Jan. 19, 2012).

³ This section sets forth certain procedural facts for context, but does not describe the full course of these proceedings since they began approximately five years ago. Additional facts are discussed, where relevant, in subsequent sections of this memorandum.

of the Bureau, and with the remark crafted by Judge Melanson in the *Pioneer* subcase.⁴ The Director also recommended that the partial decrees include remarks referencing the supplemental decrees entered in the cases of *Burley Irrigation District v. Eagle* (Idaho 5th Jud. Dist., Jul. 10, 1968), and *Aberdeen-Springfield Canal Company v. Eagle* (Idaho 7th Jud. Dist., Mar. 12, 1969).⁵ The quantities recommended for the American Falls storage right and the Palisades storage right were 1,672,590 acre-feet per year and 1,200,000 acre-feet per year, respectively.⁶

A number of parties filed objections and/or competing claims asserting an ownership interest in the American Falls and/or Palisades storage water rights,⁷ including the City of Pocatello, some members of the Surface Water Coalition, and some members of the “American Falls Spaceholders.”⁸ The State filed objections asserting “title ownership language should be amended consistent with the holding” of the Idaho

⁴ *Idaho Dep’t of Water Resources Recommended Water Rights Acquired Under State Law, Right No. 01-02064 (“Director’s Report, 01-2064”); Idaho Dep’t of Water Resources Recommended Water Rights Acquired Under State Law, Right No. 01-02068 (“Director’s Report, 01-2068”).*

⁵ *Id.*

⁶ *Director’s Report, 01-2064; Director’s Report, 01-2068.*

⁷ The following parties filed objections in April 2007 asserting an ownership interest in the storage rights for American Falls and/or Palisades: Burley Irrigation District, A&B Irrigation District, Falls Irrigation District, Minidoka Irrigation District, Twin Falls Canal Company, North Side Canal Company, Milner Irrigation District, and the City of Pocatello. The competing claims filed for the American Falls storage water right included: 01-02064A (Twin Falls Canal Company), 01-02064B (Milner Irrigation District), 01-02064C (North Side Canal Company), 01-02064D (Hillsdale Irrigation District), 01-02064E (Falls Irrigation District), 01-02064F (A & B Irrigation District), 01-02064L (New Sweden Irrigation District), 01-10042A (Twin Falls Canal Company), 01-10053A (North Side Canal Company), and 01-10190 (Minidoka Irrigation District). The competing claims filed for the Palisades storage water right included: 01-02068D (Milner Irrigation District), 01-02068E (Falls Irrigation District), 01-02068F (A & B Irrigation District), 01-02068M (New Sweden Irrigation District), 01-02068Y (City of Pocatello), and 01-10191 (Minidoka Irrigation District).

⁸ The members of the “American Falls Spaceholders” are: Aberdeen Springfield Canal Company, Blackfoot Canal Company, Burgess Canal Company, Butte & Market Lake Canal Company, Corbett Slough Ditch Company, Dilts Irrigation Company, Enterprise Canal Company, Enterprise Irrigation District, Harrison Canal Company, Idaho Irrigation District, Lenroot Canal Company, New Sweden Irrigation District, Osgood Canal Company, Peoples Canal & Irrigation & Company, Poplar Progressive Irrigation District, Reid Canal Company, Rudy Irrigation Company, Snake River Valley Irrigation District, Trego Ditch Company, and Woodville Canal Company. *American Falls Spaceholders’ Motion For Summary Judgment* (Dec. 8, 2009).

Supreme Court's decision in *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007), which had been rendered one month earlier.⁹

Some members of the Surface Water Coalition objected to aspects of the recommended remark referencing the cases of *Burley Irrigation District v. Eagle* (Idaho 5th Jud. Dist., Jul. 10, 1968), and *Aberdeen-Springfield Canal Company v. Eagle* (Idaho 7th Jud. Dist., Mar. 12, 1969).¹⁰ Others objected globally to all of the recommended remarks.¹¹ The Bureau objected that the American Falls and the Palisades storage rights should include a remark in the "quantity" elements stating that each water right "includes the right to refill under the priority date of this water right."¹² Minidoka Irrigation District also objected that both storage rights "should include the right to refill the reservoir in priority."¹³

Many of the parties filed responses to each other's objections, and members of the Idaho Ground Water Appropriators, Inc., ("IGWA") also filed responses.¹⁴ The parties attempted to negotiate a settlement to a number of issues, including those that are the subject of the State's *Motion*. While these efforts did not completely resolve any of the issues, all but one of the parties executed a stipulation for the decree of separate water

⁹ *Standard Form 1 Objection, Subcase No. 01-02064* (State of Idaho) (Apr.19, 2007); *Standard Form 1 Objection, Subcase No. 01-02068* (State of Idaho) (Apr.19, 2007);

¹⁰ See *Standard Form 1 Objections of A&B Irrigation District, Falls Irrigation District, Burley Irrigation and Minidoka Irrigation District* filed in Subcases Nos. 01-2064 and 01-2068.

¹¹ See *Standard Form 1 Objection of Twin Falls Canal Company, Milner Irrigation District and North Side Canal Company* in Subcase No. 01-2064; and *Standard Form 1 Objection of Milner Irrigation District and North Side Canal Company* in Subcase No. 01-2068.

¹² See *Standard Form 1 Objections* filed by the Bureau in Subcases Nos. 01-2064 and 01-2068 (page 2).

¹³ See *Standard Form 1 Objections* filed by Minidoka Irrigation District in Subcases Nos. 01-2064 and 01-2068 (page 3).

¹⁴ The IGWA members as listed on its responses are: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Southwest Irrigation District, Fremont-Madison Ground Water District, Clark-Jefferson Ground Water District, Goose Creek Ground Water District, the City of American Falls, the City of Blackfoot, the City of Chubbuck, the City of Heyburn, the City of Jerome, the City of Paul, the City of Rupert, Busch Agricultural, Jerome Cheese, and United Water of Idaho.

rights for the “winter water savings” of the Palisades Contracts, the storage capacity of American Falls Reservoir, and water right ownership under *Pioneer*.¹⁵

The Surface Water Coalition, IGWA and the State submitted statements that identified as remaining issues the questions of “refill” and the Palisades Contracts.¹⁶ The Surface Water Coalition also stated that “remarks for administration are necessary to implement provisions from . . . the *Eagle Decree*. The binding effect of the *Eagle Decree* stipulation and *Eagle Decree* as it pertains to the administration of these water rights is also at issue.”¹⁷ The State also identified the issue of what ownership interest non-irrigation entities, such as the City of Pocatello, have in the storage water rights.¹⁸

The State moved for partial summary judgment on the issues of ownership, references to the *Eagle Decrees*, and “refill,” as follows:

1. The Idaho Supreme Court’s decision in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), is controlling authority for purposes of determining the ownership interest the City of Pocatello may have in storage water right no. 01-2068 (Palisades Reservoir).
2. The partial decrees for storage water rights nos. 01-2064 (American Falls Reservoir) and 01-2068 (Palisades Reservoir) should not include any reference to *Burley Irrigation Dist. v. Eagle* (Idaho 5th Jud. Dist., Jul. 10, 1968) and/or *Aberdeen-Springfield Canal Co. v. Eagle* (Idaho 7th Jud. Dist., Mar. 12, 1969), and/or to the stipulations and/or supplemental decrees entered therein.
3. The following “refill” remark should be included in the partial decrees for storage water rights nos. 01-2064 (American Falls Reservoir) and 01-2068 (Palisades Reservoir) because it is 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 accumulated to storage under this right equals the decreed

¹⁵ *Stipulation To Resolve Certain Objections* (Jan. 26, 2012) (“*Stipulation*”).

¹⁶ *Surface Water Coalition’s Statement Of Remaining Issues/Proposed Trial Schedules* (Jan. 19, 2012), at 2-3; *Ground Water Districts’ Amended Statement Of Issues* (Jan. 25, 2012), at 2; *State Of Idaho’s Statement Of Remaining Issues* (Jan. 19, 2012), at 2.

¹⁷ *Surface Water Coalition’s Statement Of Remaining Issues/Proposed Trial Schedules* at 2-3.

¹⁸ *State Of Idaho’s Statement Of Remaining Issues* (Jan. 19, 2012), at 2.

quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.¹⁹

This Special Master set a briefing and hearing schedule under which the State's opening brief and affidavit(s) were to be filed no later than February 21. This memorandum and the accompany Affidavit of Michael C. Orr ("Orr Aff.") are hereby submitted pursuant to that order.

ARGUMENT

I. STANDARD OF REVIEW.

Any party may seek summary judgment, in whole or in part, at any time after the expiration of twenty (20) days from the service of process upon the adverse party or that party's appearance in the action. I.R.C.P. 56(a)-(b). Summary judgment is "not . . . a disfavored procedural shortcut," but rather one of the "principal tools" for isolating insufficient claims or defenses, and preventing the "unwarranted consumption of public and private resources" that results from allowing such issues to continue forward. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The movant has the burden of showing that no genuine issues of material fact exist, and disputed facts and reasonable inferences are construed in favor of the nonmoving party. *Soignier v. Fletcher*, 151 Idaho 322, 324, 256 P.3d 730, 732 (2011).

¹⁹ *Motion* at 2.

When the action will be tried before the court without a jury, the court as trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant summary judgment despite the possibility of conflicting inferences. *Beus v. Beus*, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011). The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences. *Id.*

Immaterial issues of fact do not preclude the granting of summary judgment. *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 615, 167 P.3d 748, 752 (2006). Conclusory assertions unsupported by specific facts do not create a genuine issue of material fact, *Mareci v. Coeur D'Alene School Dist. No. 271*, 150 Idaho 740, 744, 250 P.3d 791, 795 (2011), nor does a mere scintilla of contrary evidence. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010). In the absence of genuine disputed issues of material fact, only a question of law remains, and the court exercises free review. *Stuard v. Jorgenson*, 150 Idaho 701, 704, 249 P.3d 1156, 1159 (2011). Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Patterson v. State, Dept. of Health & Welfare*, 151 Idaho 310, 315, 256 P.3d 718, 723 (2011).

II. THE IDAHO SUPREME COURT'S *PIONEER* DECISION IS THE CONTROLLING LEGAL AUTHORITY FOR RESOLVING THE CITY OF POCATELLO'S OWNERSHIP OBJECTION.

The first count of the State's *Motion* seeks a ruling that the controlling legal authority for determining the City of Pocatello's ownership interest in the Palisades Reservoir storage right (1-2068) is *United States v. Pioneer Irrigation District*, 144 Idaho

106, 157 P.3d 600 (2007). *Motion* at 2. All parties but the City have stipulated that the ownership element of the partial decree should conform to the Idaho Supreme Court's instructions in *Pioneer* with respect to irrigation storage,²⁰ and the City has filed in its own name a competing claim to the water right, which is pending in Subcase No. 01-2068Y.

The *Pioneer* case also involved competing claims of ownership to the water rights for a federal reservoir. 144 Idaho at 108, 157 P.3d at 602. The competing claims were disallowed, *id.*, and the Idaho Supreme Court held that the various ownership interests should be reflected by naming the United States as the "Owner," and by including a specific remark the Court crafted to describe the ownership interests of the other parties. *Id.* at 115, 157 P.3d at 609. The ownership issue in this case is indistinguishable from *Pioneer*, and thus the City's ownership claim must be resolved as the ownership issue was resolved in *Pioneer*.

Accordingly, this Court should disallow the City's competing claim (Subcase No. 01-2068Y) and the Palisades storage water right should be decreed with the United States (acting through the Bureau of Reclamation) as the owner, with the *Pioneer* remark included. This resolution would be consistent with the *Stipulation*, and would resolve the City's ownership claim in accordance with controlling Idaho law as applied in *Pioneer*. Thus, the State is entitled to summary judgment as a matter of law on the first count of the State's *Motion*.²¹

²⁰ *Stipulation* at 4-6.

²¹ The State's *Motion* does not seek to resolve the City's objection that the Palisades storage right should be decreed for additional purposes of use that were not included in the Director's Report.

III. THE *EAGLE DECREES* DID NOT ADJUDICATE ANY WATER RIGHTS OR ADMINISTRATIVE PROVISIONS, AND REFERENCING THEM IN THE AMERICAN FALLS AND PALISADES STORAGE WATER RIGHTS WOULD ONLY INJECT THE DEPARTMENT AND/OR THE WATERMASTER INTO PRIVATE CONTRACTUAL DISPUTES AMONG SPACEHOLDERS.

The second count of the State's *Motion* seeks a ruling that the partial decrees for the American Falls and Palisades storage water rights should not include any references to the cases of *Burley Irrigation District v. Eagle* (Idaho 5th Jud. Dist., Jul. 10, 1968), *Aberdeen-Springfield Canal Company v. Eagle* (Idaho 7th Jud. Dist., Mar. 12, 1969), and/or to the supplemental decrees or stipulations entered therein. *Motion* at 2.²² (The cases, and the supplemental decrees and stipulations entered therein, are hereinafter collectively referred to as "the *Eagle Decrees*.") A partial decree should include a remark only when necessary to define the water right, clarify one of its elements, or to administer the water right. Idaho Code §§ 42-1411(2)(j), 42-1412(6). As discussed below, the Presiding Judge's holdings regarding the *Eagle Decrees* have foreclosed any contention that references to the *Eagle Decrees* are necessary to define, clarify or administer the American Falls and Palisades storage water rights.

The *Eagle Decrees* first came before the Presiding Judge pursuant to the Surface Water Coalition's *Joint Motion To Designate A Basin-Wide Issue, Subcase No. 00-91015* (Oct. 2, 2009) ("*Joint Motion*"),²³ which sought designation of the following 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?" *Order Denying Motion To Designate Basin-Wide Issue, Subcase*

²² This narrow request does not seek interpretations of the Palisades Contracts or determinations of whether any provisions of the Palisades Contract should be reflected in the partial decrees.

²³ Idaho Power Company also joined in the motion. *Idaho Power Company's Joinder In Joint Motion To Designate Basin-Wide Issue, Subcase No. 00-91015* (Oct. 8, 2009).

No. 00-91015 (Mar. 1, 2010), at 2. Judge Wildman also revisited the *Eagle Decrees* in two subsequent decisions in the Minidoka and Palisades power rights subcases:²⁴ the *Memorandum Decision And Order On Challenge* (Feb. 9, 2011) (“*Order On Challenge*”); and the *Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011) (“*Order On Motion To Alter Or Amend*”).

In the course of denying the motion to designate a basin-wide issue on the “common plan,” Judge Wildman determined that the “common plan” “stems entirely from express provisions included in the Palisades Contracts that were subsequently incorporated by reference into the *Eagle Decrees*.” *Order Denying Motion To Designate Basin-Wide Issue* at 9.²⁵

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 the specific projects or contract provisions (as incorporated by the *Eagle Decrees*) would in all likelihood have to be decided in separate or “piece-meal” proceedings even if under the “umbrella” of a basin-wide issue.

Id. at 10. The Judge stated that the real issue might be more appropriately formulated as: “To what extent if any should provisions of the reclamation contracts be memorialized in partial decrees or a general provision for basin 01?” *Id.* at 11.

In short, the Presiding Judge recognized that for purposes of decreeing Basin 1 water rights, the “common plan” of the *Eagle Decrees* is nothing more than various contractual provisions of the Palisades Contracts, and it is more efficient and makes more analytical sense to simply bypass the *Eagle Decrees* and go straight to the Palisades

²⁴ Subcase Nos. 01-217, 01-218, 01-4024, and 01-4025 (Minidoka Power Rights); and Subcases Nos. 01-2068 and 01-4054 (Palisades Power Rights).

²⁵ The “Palisades Contracts” are a group of “more than 50 formal contracts . . . entered into by the USBOR and various water users in the Upper Snake River Basin” in connection with the Palisades Dam and Reservoir Project. *Order On Challenge* at 8.

Contracts themselves. Judge Wildman also pointed out that the Surface Water Coalition had already raised the *Eagle Decrees* and the “common plan” argument before this Special Master, in the Minidoka and Palisades power rights subcases, for purposes of opposing summary judgment motions filed by the State and the Bureau. *Order Denying Motion To Designate Basin-Wide Issue* at 9.

In the Minidoka and Palisades power rights subcases, this Special Master rejected the Surface Water Coalition’s argument that the Court should decree a remark or general provision incorporating the *Eagle Decrees* and/or the “common plan,” as well as the contention that the *Eagle Decrees* amounted to a general adjudication binding on the State and the United States. *Order Granting Motions For Summary Judgment and Special Master Report And Partial Recommendation* (Mar. 25, 2010), at 10-14; *Order Denying Joint Motion To Alter Or Amend* (Jul. 29, 2010), at 5-6. This Special Master also distinguished between the contractual obligations of the Palisades Contracts and the elements of a water right established by state law. *Id.*

On challenge, the Presiding Judge affirmed this Special Master’s conclusions that neither the Bureau nor the State of Idaho are bound by the *Eagle Decrees* and that the *Eagle Decrees* did not constitute a *de jure* and *de facto* general adjudication. *Order On Challenge* at 11. The Judge held, rather, that the *Eagle Decrees* were only summary supplemental adjudications that “did not adjudicate any right to the use of water. Rather, [they] simply gave a *prima facie* right to the delivery of so much water.” *Id.* at 13.²⁶ The Judge also affirmed that this Special Master “correctly identified in his *Order* that a

²⁶ Judge Wildman also held “[t]he adjudication resulting in the *Eagle Decree* did not fall within the terms of the McCarran Amendment.” *Order On Challenge* at 14.

difference exists between pure contractual rights and interests in a water right under state water law.” *Id.* at 24.

The Surface Water Coalition sought reconsideration, arguing the State was bound by the *Eagle Decrees* because the watermaster was a named party, and also arguing the Bureau was attempting to amend the Palisades Contracts through the SRBA decree process. *Order On Motion To Alter Or Amend* at 2. The Presiding Judge treated the motion as a request to alter or amend under Rule 59 and denied it, holding “[t]he State of Idaho is not ‘bound’ by the terms of the *Eagle Decree* for purposes of the SRBA.” *Id.* at 3. Further:

to the extent the State of Idaho is bound by the *Eagle Decree*, the scope to which it is bound is for a much more limited purpose than the position argued by the SWC. . . . the watermaster was joined in the action in the limited capacity as the instrumentality responsible for administering the water rights within a water district according to priority. . . . Indeed the watermaster was not joined for purposes of adjudicating or confirming the underlying validity of any of the elements of the unadjudicated water right. Likewise, any binding effect of the decree on the State of Idaho is limited to the purpose of ensuring the delivery and administration of the water until such time as the water right is contested in a subsequent proceeding.

Id. at 4. The Judge then held: “The Eagle Decree did not adjudicate any water rights or other administrative provisions,” *id.* at 5 (underlining added), and “not only failed to result in a *de facto* general adjudication for purposes of binding non-parties but it also failed to adjudicate any water rights *de facto* or otherwise.” *Id.* at 7 (underlining in original). Thus,

the only “binding” effect on the watermaster, IDWR or the State of Idaho would be to recognize and deliver water in accordance with the *prima facie* showing of the unadjudicated water right on an interim basis until such time as the water right is either contested or adjudicated in a subsequent proceeding. In this case the subsequent proceeding is the SRBA. . . . The State is simply not bound by the terms of the *Eagle*

Decree for the purposes of the proceedings in the above-captioned water right claims.

Id. at 11-12.

Turning to the question of whether the Bureau was breaching or circumventing the Palisades Contracts through the SRBA decree process, the Presiding Judge again emphasized “the difference between rights that are purely contractual in nature and interests in water rights pursuant to state law.” *Id.* at 12.

[I]t needs to be pointed out that it is beyond the scope of the authority and function of the watermaster and/or IDWR to resolve private contract dispute as part of their administrative duties. . . . The watermaster and IDWR are not responsible for getting in the middle of private contract disputes.

Id. at 14.

These holdings confirm there should be no reference to the *Eagle Decrees* in the American Falls and Palisades storage water rights. After thorough and repeated consideration of the nature and effect of the *Eagle Decrees*, the Presiding Judge has conclusively held that the *Eagle Decrees* did not adjudicate any water rights, did not adjudicate any administrative provisions, are not binding on the State or the Bureau, and the “common plan” is simply an agreement among certain water users to be mutually bound by certain provisions of each others’ various Palisades Contracts. In short, referencing the *Eagle Decrees* in the storage rights for American Falls and Palisades reservoirs is not necessary to define, clarify or administer the rights.

Further, referencing or incorporating the *Eagle Decrees* in the American Falls and Palisades storage rights would improperly ignore “the difference between rights that are purely contractual in nature and interests in water rights pursuant to state law.” *Order On Motion To Alter Or Amend* at 12. Any question as to the scope or effect of the “common

plan” is a purely contractual matter among the parties to the *Eagle Decrees*. Referencing or incorporating the *Eagle Decrees* in the American Falls and Palisades storage water rights could easily put the watermaster or the Director squarely “in the middle of private contract disputes,” which are “beyond the scope of the authority and function of the watermaster and/or IDWR to resolve.” *Id.* at 14. Efficient water rights administration would be the first casualty of referencing the *Eagle Decrees* in the American Falls and Palisades storage rights.

Thus, the State is entitled to summary judgment as a matter of law that the *Eagle Decrees* should not be referenced in the partial decrees for water rights nos. 1-2064 and 1-2068. The Presiding Judge’s *Eagle Decrees* holdings leave no room for any other conclusion.

IV. THE STATE’S “REFILL” REMARK PROVIDES THE LEGAL AUTHORITY NECESSARY TO CONTINUE RESERVOIR “REFILL” OPERATIONS IN ACCORDANCE WITH IDAHO LAW, HISTORIC RESERVOIR OPERATIONS, AND WATER RIGHT ADMINISTRATION.

The third count of the State’s *Motion* seeks a ruling that the following “refill” remark should be included in the partial decrees for the American Falls and Palisades storage water rights:

This right is filled for a given irrigation season when the total quantity of water that has accumulated to storage under this right equals the decreed quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.²⁷

This remark is “necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.” Idaho Code § 42-1411(2)(j); *see also id.* § 42-1412(6) (“The decree shall contain or incorporate a statement of each

²⁷ *Motion* at 2.

element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable.”).

A. There Is No Dispute That A Remark Authorizing Storage “Refill” Is Necessary To Define, Clarify And Administer The American Falls And Palisades Storage Water Rights – The Disputed Issue Is What Priority, If Any, Applies To “Refill.”

While the parties disagree on whether “refill” should be subordinated, there appears to be no dispute that a remark authorizing “refill” is necessary. The Bureau’s objections asserted the “Quantity” element should include a remark stating “[t]his water right includes the right to refill”²⁸ Minidoka Irrigation District also objected that the partial decrees “should include the right to refill”²⁹ More recently, all members of the Surface Water Coalition asserted “[a] remark should be added regarding Reclamation’s right to refill the storage”³⁰

“Refill” is an imprecise term that can have more than one meaning in the context of the separate but closely related arenas of federal reservoir operations and state water rights administration in Basin 1.³¹ For purposes of the State’s *Motion*, the term “refill”

²⁸ *Standard Form 1 Objection, Subcase No. 1-2064* at 2 (Apr. 19, 2007) (United States, acting through the Department of the Interior, Bureau of Reclamation, Regional Director PN Code-3100); *Standard Form 1 Objection, Subcase No. 1-2068* at 2 (Apr. 19, 2007) (United States, acting through the Department of the Interior, Bureau of Reclamation, Regional Director PN Code-3100).

²⁹ *Standard Form 1 Objection, Subcase No. 1-2064* at 3 (Apr. 19, 2007) (Minidoka Irrigation District); *Standard Form 1 Objection, Subcase No. 1-2068* at 2 (Apr. 19, 2007).

³⁰ *Surface Water Coalition’s Statement of Issues/Proposed Trial Schedules* at 2, 3 (Jan. 19, 2012).

³¹ The term “refill” often refers to physically refilling reservoir space that had previously been filled in the same season, but was subsequently emptied. *See* WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1944 at 3 (Orr Aff., Exhibit 1) (“by June 1 about 110,000 acre-ft. had been withdrawn from American Falls Reservoir. The reservoir refilled, however”). “Refill” can also refer, however, to the accounting practice of “cancelling” early season storage charges when a reservoir refills later in the season. *See* WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1953 at 30 (Orr Aff., Exhibit 2) (referring to storage uses from American Falls and Jackson Lake reservoirs “which were canceled out due to those reservoirs filling again during June to full capacity”); *see also* 1969 ANNUAL HISTORY OF THE MINIDOKA AREA PROJECTS at 128 (Orr Aff., Exhibit 3) (“Spaceholders were given refill conditions on July 10, after Jackson Lake filled.”). The term “refill” can even also sometimes refer to the initial fill of the season. *See* 2006 ANNUAL REPORT – WATER DISTRICT 1 at 97 (Orr Aff., Exhibit 4) (Water District 1 2006 Rental Pool Procedures, Rule 1.8) (“If refill of

refers to operating a reservoir to physically divert and store additional water after the reservoir's storage right has already "filled" for the year – that is, the cumulative amount of water that has actually been stored over the course of the year reaches the maximum annual storage quantity authorized by the decree. Such operations are generally referred to as "refill" because they are frequently undertaken to physically "refill" reservoir storage space that had filled earlier in the season, but subsequently emptied as a result of storage use by spaceholders, operational releases by the Bureau for purposes such as flood control, or other reasons.³²

"Refill" operations help maximize the use and value of the federal reservoir system in the upper Snake River basin by storing as much water as possible above Milner Dam, especially for irrigation use, the primary purpose for which the reservoirs were authorized. Flows spilling past Milner Dam enter a deep canyon and have historically been considered "lost" or "wasted" for irrigation purposes,³³ and so maximizing the amount of water stored above Milner Dam each year has always been the paramount objective of federal reservoir operations.³⁴ In-season "refill" operations support this objective and the purpose of the federal reservoir system.

For the same reasons, in-season "refill" of the reservoirs above Milner Dam effectuates the State of Idaho's "constitutionally enunciated policy of optimum

the storage system does not occur the following year"). Prior to 1971, Water District No. 1 was known as Water District No. 36.

³² See, e.g., WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1946 at 11 (Orr Aff., Exhibit 5) ("About 44,000 acre-feet of storage were withdrawn from American Falls Reservoir May 15-27 to fill downstream demands. The reservoir subsequently refilled, however").

³³ See, e.g., WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1936 at 9 (Orr Aff., Exhibit 6) ("It is a matter of regret that lack of storage facilities resulted in the waste of 620,000 acre-feet of surplus flood waters past Milner during 1936.").

³⁴ See, e.g., Letter from Ass't Sec. of the Interior Kenneth Holum to Federal Power Commission Chairman Joseph C. Swidler (Aug. 30, 1962), at 4 (Orr Aff., Exhibit 7) ("[the Department] has constructed upstream from Milner a reservoir system in excess of 4,500,000 acre-feet, all of which is operated with the objective of conserving the water to minimize spills past Milner Dam").

development of water resources in the public interest,” *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 583, 513 P.2d 627, 635 (1973), which among other things seeks to “maximize the amount of water available for development above [Milner] dam, including groundwater development in the Aquifer.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 799, 252 P.3d 71, 80 (2011).³⁵ “Refill” directly supports the objective of maximizing the amount of water available for development above Milner Dam by increasing the supply of stored water.

The Bureau has historically operated the upper Snake River reservoirs to take advantage of in-season refill opportunities, and Water District 1 developed administrative practices and procedures to account for such operations.³⁶ The Director’s recommendations for the American Falls and Palisades storage water rights, however, did not include a remark authorizing in-season “refill.” This fact 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.³⁷

In sum, a “refill” remark must be included in the partial decrees for the American Falls and Palisades water rights to effectuate state law and policy intended to maximize the water supply available for development above Milner Dam, to validate and continue historic federal reservoir operations and state water rights administration, and to avoid

³⁵ The State Water Plan, which is the State’s constitutionally authorized “plan for optimum development of water resources in the public interest,” Id. Const. art. XV § 7, has consistently called for a zero minimum flow at Milner Dam since it was first issued in 1976. *Clear Springs Foods, Inc.*, 150 Idaho at 799, 252 P.3d at 80.

³⁶ Historic federal reservoir operations and state water right administration are discussed in a subsequent section of this memorandum. See *infra* Part IV.E.

³⁷ See, e.g., WATERMASTER HANDBOOK (Idaho Dep’t of Water Resources), at 20 (Orr Aff., Exhibit 8) (“Reservoirs are allowed to fill only once an irrigation season unless otherwise specified on the water right or determined by the Director.”).

future uncertainty and ambiguity by providing clear legal authority for refill operations. Thus, a “refill” remark is necessary to define, clarify and administer the American Falls and Palisades storage water rights. Idaho Code §§ 42-1411(2)(j), 42-1412(6).³⁸

Accordingly, the disputed “refill” issue in these subcases is not whether the partial decrees should include a remark authorizing the Bureau to refill the reservoirs, but rather is one of priority: should such operations be subordinated or under the same priority as the initial “fill.” The Surface Water Coalition contends that “refill” should be “under the same priority” as the first filling of the decreed quantity,³⁹ while the State’s position is that once the decreed quantity has been filled, the storage of any additional water “is incidental and subordinate to all existing and future water rights.”⁴⁰ As discussed below, the State is entitled to summary judgment as a matter of law on this point because the Idaho law requires that storage “refill” operations be subordinated, and the priority “refill” remark sought by the Surface Water Coalition would effectively create unquantified water rights with a prior entitlement to all “excess” water, which is forbidden by Idaho law.

³⁸ For the same reasons, a “refill” remark should also authorize storing additional water after the storage right has filled “on paper” but the reservoir has not yet filled physically. This situation can occur when the Bureau releases stored water from the reservoir (due to storage water use by spaceholders, flood control, or other reasons) before the decreed annual quantity has been reached, or when some of the water accruing to one reservoir’s storage right is physically captured and held in a different reservoir. See, e.g., Draft Transcript of “Deposition of Anthony Olenichak, February 9, 2012,” at 15 (“Olenichak Depo.”) (Orr Aff., Exhibit 9) (“A. . . . it’s common for the physical contents [of the reservoir] not to match the water we’ve accrued [to the right] on paper.”). Thus, not only is the term “refill” imprecise, but a remark limited to authorizing “refill” arguably would not authorize storing additional water after the storage right had filled unless the reservoir had also filled physically – even if empty reservoir space was in fact available to hold the additional water. It is for these reasons that the State’s proposed “refill” remark authorizes the storing of “additional water” rather than using the potentially ambiguous term “refill.”

³⁹ *Surface Water Coalition’s Statement of Issues/Proposed Trial Schedules* at 2, 3 (Jan. 19, 2012); see also *Standard Form 1 Objection, Subcase No. No. 1-2064* at 3 (Apr. 19, 2007) (Minidoka Irr. Dist.) (stating that refill should be “in priority”); *Standard Form 1 Objection, Subcase No. 1-2068* at 2 (Apr. 19, 2007) (Minidoka Irr. Dist.) (same); *Standard Form 1 Objection, Subcase No. 1-2064* at 2 (Apr. 19, 2007) (Bureau) (stating that “refill” should be “under the priority date of this water right”); *Standard Form 1 Objection, Subcase No. 1-2068* at 2 (Apr. 19, 2007) (Bureau) (same).

⁴⁰ *State of Idaho’s Motion for Partial Summary Judgment* at 2 (Jan. 25, 2012).

B. The Official Record Confirms That The Storage Water Right For American Falls Reservoir Never Included A Right to Priority “Refill.”

1. The American Falls Storage Water Right Was Permitted, Licensed And Decreed With An Annual Storage Quantity Limitation That Precluded A Right To Priority “Refill.”

The Bureau applied to the Idaho Commissioner of Reclamation in 1921 for a permit to build the American Falls Reservoir and store 3 million acre-feet “per annum,” because at the time the Bureau planned a reservoir of that size.⁴¹ The application was approved, designated as Permit No. R-269, and made subject to the conditions that the reservoir be one-fifth built by November 1923, completed by May 1926, and beneficial use shown by April 1936.⁴²

In April 1923 the Bureau applied for and received a 5-year extension (until 1931) for completing the reservoir,⁴³ which at the time was still planned as a 3 million acre-foot facility.⁴⁴ The reservoir as completed in 1927 was smaller, however, with a storage capacity of 1.7 million acre-feet.⁴⁵ Thus, in the 1929 “Woodville Decree,” the Bureau was “awarded and decreed” a right for “one million seven hundred thousand (1,700,000) acre-feet per annum for storage in the American Falls Reservoir.”⁴⁶ The Woodville

⁴¹ “Application For A Permit To Construct The American Falls Reservoir And To Store The Unappropriated Waters Of The State Of Idaho,” Mar. 30, 1921 (Orr Aff., Exhibit 10) (underlining added).

⁴² *Id.* The Bureau simultaneously filed an application for direct diversion of 8,000 cfs of natural flow (which was approved under Permit No. 15134). *Id.* The natural flow water right is pending in Subcase No. 01-0006.

⁴³ “Permit No. R-269 and Permit No. 15134 – Application For Extension Of Time” (Apr. 5, 1923), at 1-2 (Orr Aff., Exhibit 11); *Order Granting Extension of Time* (Apr. 7, 1923) (Orr Aff., Exhibit 12); *see also Order Granting Extension of Time For Completion of Works, In the matter of the Application of the United States of America for Extension of Time for Proof of Completion of Works Under Permits Nos. R-269 and 15237* (Jul. 10, 1926) (Orr Aff., Exhibit 13). The same orders also extended the time for making proof of beneficial use. *Id.*

⁴⁴ “Affidavit of F.A. Banks,” (Mar. 31, 1923), at 1-2 (Orr Aff., Exhibit 14); “Affidavit of Barry Dibble,” (Mar. 31, 1923), at 1-2 (Orr Aff., Exhibit 15).

⁴⁵ http://www.usbr.gov/projects/Project.jsp?proj_Name=Minidoka+Project (visited Feb. 10, 2012).

⁴⁶ Decree 661, *Woodville Canal Co. v. Clark & Edwards Canal & Irr. Co., et al* (D. Idaho, Jun. 25, 1929) (“Woodville Decree”), at 27 (underlining added) (Orr Aff., Exhibit 16). The Woodville Decree also decreed a separate natural flow right under direct diversion Permit No. 15134. *Id.*

Decree was based, in large part, on a stipulation that included a number of the parties to these subcases – the Bureau and the Secretary of the Interior, as well as various members of the “Surface Water Coalition” and the “American Falls Spaceholders.”⁴⁷ In the stipulation, the parties agreed that the American Falls storage right should be decreed for “One Million Seven Hundred Thousand (1,700,000) acre-feet per annum for storage in the American Falls Reservoir.”⁴⁸

In 1931 the Bureau submitted proof of completion of a 1.8 million acre-foot capacity reservoir to the Idaho Commissioner of Reclamation.⁴⁹ The following year, the Commissioner issued a “Certificate of Completion of Reservoir and Right to Store Water” for Permit No. R-269. The certificate recited an “Amount” of “1,800,000 Acre Feet” and “said works are adequate for the storage of 1,800,000 acre feet of water annually,” and stated that “a right to store the said waters has been perfected . . . and is

⁴⁷ See Woodville Decree at 2 (“Stipulation”); see also *id.* at 1-2 (listing parties, including the United States Reclamation Service, the Secretary of the Interior of the United States, Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company, Aberdeen-Springfield Canal Company, Blackfoot Canal Company, Burgess Canal Company, Butte & Market Lake Canal Company, Corbett Slough Ditch Company, Dilts Irrigation Company, Enterprise Canal Company, Enterprise Irrigation District, Harrison Canal Company, New Sweden Irrigation District, People Canal & Irrigation Company, Poplar Progressive Irrigation District, Reid Canal Company, Snake River Valley Irrigation District, Trego Ditch Company, and Woodville Canal Company).

⁴⁸ Woodville Decree at 5 (underlining added); see also *Stipulation, Woodville Canal Co. v. Clark & Edwards Canal & Irr. Co., et al* at 4-5 (Orr Aff., Exhibit 17) (*same*).

⁴⁹ “Affidavit of Publication,” American Falls Press (American Falls, Idaho) (May 18, 1931) (Orr Aff., Exhibit 18); Letter from USBR District Counsel B.E. Stoutemyer to American Falls Press (May 4, 1931) (Orr Aff., Exhibit 19) (enclosing “Notice for Publication”); “Proof of Completion of Works – Deposition of Holder” (May 16, 1931) (Orr Aff., Exhibit 20); “Proof of Completion of Works – Deposition of Witness” (May 16, 1931) (Orr Aff., Exhibit 21). The 100,000 acre-foot difference between the decreed annual storage quantity of 1.7 million acre-feet in the Woodville Decree and the 1.8 million acre-foot reservoir storage capacity recited in the 1931 proof was due to 100,000 acre-feet of so-called “bank storage capacity,” i.e., underground storage capacity “in the loose material on the borders of the reservoir” which became saturated when the reservoir was filled, and drained into the reservoir when it was drawn down. Letter from USBR District Counsel B.E. Stoutemyer to Idaho Commissioner of Reclamation E.V. Berg (Jun. 23, 1942) (Orr Aff., Exhibit 22). The “quantity” element of the American Falls storage right to which all parties except the City of Pocatello stipulated does not include any component or allowance for “bank storage.” *Stipulation* at 3-4.

hereby confirmed . . . and that the amount of water to which said right is . . . entitled, to store annually shall not exceed 1,800,000 acre feet.”⁵⁰

In March 1936, the Minidoka Project superintendent prepared publication notices for the impending submission of proof of beneficial use (which was due in April under the original terms of Permit No. R-269) and forwarded the notices to the Idaho Reclamation Commissioner. The notices stated the amount applied to beneficial use was “one million eight hundred thousand (1,800,000) acre-feet per year.”⁵¹ Before proof was due, however, the Bureau’s counsel sought a statutory extension of 5 more years (until 1941) to prove beneficial use under Permit No. R-269,⁵² which the State Commissioner of Reclamation granted.⁵³

In April 1941, the Idaho Commissioner of Reclamation prepared and published new notices of the Bureau’s proof of beneficial use, once again stating “[t]he amount applied to beneficial use is 1,800,000 acre-feet per annum.”⁵⁴ The State issued a “License and

⁵⁰ “Permit No. R-269 - Certificate Of Completion of Reservoir And Right To Store Water” (State Commissioner of Reclamation) (Jul. 12, 1932) (underlining added) (Orr Aff., Exhibit 23).

⁵¹ “Notice of Publication – Notice of Proof of Application of Water To Beneficial Use” (Permit No. R-269) (underlining added) (Orr Aff., Exhibit 24); *see also* Letter from State Commissioner of Reclamation R.W. Faris to Acting Minidoka Project Superintendent Dana Templin (Mar. 13, 1936) (Orr Aff., 25) (referring to completed notices received from the Bureau); Letter from State Commissioner of Reclamation R.W. Faris to USBR District Counsel B.E. Stoutemyer (Apr. 7, 1936) (Orr Aff., Exhibit 26) (“it is customary to mail these notices about 60 days prior to the date when proof is due, in order to allow sufficient time for publication”).

⁵² Letter from USBR District Counsel B.E. Stoutemyer to State Commissioner of Reclamation R.W. Faris (Apr. 6, 1936) (Orr Aff., Exhibit 27). While Stoutemyer’s extension application sought only an extension based only on statute, the Commissioner’s 1923 and 1926 orders extending the time for completion of the reservoir also provided a basis for seeking an extension of time for showing beneficial use. “Permit No. R-269 and Permit No. 15134 – Application For Extension Of Time” (Apr. 5, 1923), at 1-2 (Orr Aff., Exhibit 11); “Order Granting Extension of Time” (Apr. 7, 1923) (Orr Aff., Exhibit 12); *Order Granting Extension of Time For Completion of Works, In the matter of the Application of the United States of America for Extension of Time for Proof of Completion of Works Under Permits Nos. R-269 and 15237* (Jul. 10, 1926) (Orr Aff., Exhibit 13).

⁵³ Letter from State Commissioner of Reclamation R.W. Faris to USBR District Counsel B.E. Stoutemyer (Apr. 7, 1936) (Orr Aff., Exhibit 26).

⁵⁴ “Notice of Publication – Notice of Proof Application of Water to Beneficial Use” (E.V. Berg, Idaho Commissioner of Reclamation) (underlining added) (Orr Aff., Exhibit 28); *see also* “Affidavit of Publication” Idaho Evening Times (Twin Falls, Idaho) (Apr. 10, 1941) (Orr Aff., Exhibit 29) (same).

Certificate of Water Right” for Permit No. R-269 the following year, which was designated Water License No. R-269.⁵⁵ The license recited an “Amount” of “1,800,000 acre feet per annum,” and further stated:

That the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually needed and beneficially used for said purposes, and shall not exceed 1,800,000 acre feet per annum, of which amount 1,700,000 acre feet represents the rated cubical contents of the reservoir and 100,000 acre feet is the maximum annual bank storage.⁵⁶

In sum, the plain language in the official record clearly, unambiguously and repeatedly confirms that the storage water right for American Falls Reservoir was developed and established as a right to store a cumulative total quantity of 1.8 million acre-feet per year, and no more. The right was carefully and repeatedly defined in terms of the maximum quantity of water allowed to be stored annually.

Had the intent been otherwise, such as to create an right to divert and store each and every year whatever quantity of water was needed to physically fill the reservoir, “refill” it, or to maintain it at full capacity even while storage water was being drafted, such an intent could easily have been reflected in such terms or other appropriate language – but it was not.⁵⁷ At no point was the right quantified in terms of an entitlement to “fill” or “refill” the reservoir. Nothing on the face of the license, the Woodville Decree or the permit contemplated, referenced or authorized “refill” — the word simply does not appear anywhere in these documents. To the contrary, the permit, decree and license clearly precluded “refill,” because they defined the maximum quantity

⁵⁵ “State of Idaho - License and Certificate of Water Right,” Water License R-269 (Jul. 9, 1942) (Orr Aff., Exhibit 30) (underlining added).

⁵⁶ *Id.* (underlining added). All parties but the City of Pocatello have stipulated to a “quantity” element for the American Falls storage right that does not include a “bank storage” component. *Stipulation* at 3-4.

⁵⁷ Such an un-quantified, open-ended water right also would have been contrary to law, as discussed in a subsequent section of this memorandum

that could be stored each year, and “refill” would necessarily have resulted in storing more than the authorized annual maximum in one year.

The lack of any “refill” authority under the priority of the American Falls storage right was confirmed in a contemporary analysis by the Bureau’s District Counsel B.E. Stoutemyer, who had filed the applications and proofs for the American Falls storage right, and represented the United States in the litigation for both the Foster and Woodville Decrees.⁵⁸ In a 1934 letter to the Bureau’s Chief Engineer addressing the question of “refilling” American Falls Reservoir, Stoutemyer wrote:

our decreed right under the Woodville decree for filling American Falls reservoir is 1,700,000 acre-feet Before the state commissioner of reclamation we proved up on 1,800,000 acre-feet for storage in American Falls reservoir I presume . . . the balance of our American Falls reservoir filing over the 1,800,000 acre-feet [has lapsed]. . . . the state officers administering the Snake river [sic] will no doubt be governed by the amount set out in the Woodville decree and would decline to close down any headgates of any later reservoirs after the American Falls reservoir has received its decreed amount of 1,700,000 acre-feet. . . . in my opinion we could not secure more than 1,800,000 acre-feet under our priority of 1921 ⁵⁹

Thus, the official record for the American Falls storage water right was permitted, licensed and decreed as strictly limited to storing a maximum quantity of 1.8 million acre-feet per year, of which 100,000 acre-feet was “bank storage.” This quantity limitation precluded any asserted right to a priority “refill,” as even the Bureau’s own counsel concluded.

⁵⁸ Woodville Decree at 1 (Orr Aff., Exhibit 16).

⁵⁹ Letter from USBR District Counsel B.E. Stoutemyer to USBR Chief Engineer (Aug. 24, 1934), at 1 (Orr Aff., Exhibit 31) (underlining added). Stoutemyer also opined that while it might be possible to obtain a water right for additional storage under the constitutional method of appropriation as a result of actually storing more than the decreed quantity, “the priority of the additional amount would not relate back to 1921.” *Id.*

2. The Official Record Of The Palisades Project Confirms That The American Falls And Palisades Storage Water Rights Never Included A Right To Priority “Refill.”

The water supply studies the Bureau undertook and relied upon to justify the construction of Palisades Reservoir confirmed that the American Falls storage right was limited to a total quantity of 1.7 million acre-feet per year. The question of how much water would be available for storage in the proposed Palisades Reservoir was crucial to Congress’s decision of whether to authorize the project – so important, in fact, that “the authorization and funding of Palisades Dam and Reservoir was contingent upon the securing of an adequate water supply for the reservoir.” *Memorandum Decision And Order On Challenge, Subcase Nos. 01-217, 01-218, 01-4024, 01-4025 (Minidoka Power Rights), 01-2068 and 01-4054 (Palisades Power Rights)* (Feb. 9, 2011) at 8; *see also* Pub. L. No.81-864 § 4, 64 Stat. 1083 (1949) (“The continuation of construction of Palisades Dam . . . is hereby made contingent on contracts . . . that . . . will provide for an average annual savings of one hundred thirty-five thousand acre-feet of water”).

The Bureau carefully analyzed “[t]he surplus water on Snake River for new reservoirs,” which was “determined from a consideration of inflow to American Falls reservoir and the prior demand thereon.”⁶⁰ The Bureau’s 1935 “Report On Upper Snake River Storage Investigations – Volume I – Snake River Above Idaho Falls” (“1935 Storage Investigations Report”) stated that the quantity of water owed to American Falls “annually before any surplus will be available for additional upstream reservoirs” was

⁶⁰ *See* 1935 Storage Investigations Report at 143 (Orr Aff., Exhibit 32); *see also* “WATER SUPPLY FOR PALISADES RESERVOIR PROJECT, IDAHO – PROJECT PLANNING REPORT 1-5.17-1 – A GENERAL PLAN FOR THE ELIMINATION OF WINTER DIVERSIONS, COORDINATED OPERATION OF RESERVOIRS, AND DEVELOPMENT OF NEW LAND” (U.S. Dep’t of the Interior, Bur. Of Reclamation) (Oct. 1946), Report of Regional Director at 12 (Orr Aff., Exhibit 33) (“These derived irrigation requirements, river losses, and river gains were applied to the recorded stream flows to determine surplus flows available for storage”); *id.*, Report of Regional Director at 15 (referring to “capturing surplus flows” in Palisades Reservoir); *id.*, Substantiating Report at 6 (“serious [crop] losses revealed the urgent need for additional storage to hold over the excess waters of wet years”)

limited to 1,700,000 acre-feet.⁶¹ The Bureau's 1940 follow-up study, "Report On Upper Snake River (South Fork) Storage Investigations – Grand Valley Reservoir," referenced and relied upon these conclusions.⁶² Neither of these studies stated or contemplated that the American Falls storage right included an entitlement to priority "refill." To the contrary, their discussions of the water rights senior to Palisades conspicuously omitted any mention of priority "refill." For instance, the 1935 Storage Investigations Report carefully enumerated the "superior" requirements to which Palisades storage would be subject: "Inflow to American Falls reservoir available for storing in new upstream reservoirs is subject to the following superior requirements: . . . (e) Waters required to fill American Falls reservoir and Lake Walcott."⁶³ Significantly, this list made no mention of a similar "superior" right to "refill," even though the 1935 Storage Investigations Report recognized that American Falls was sometimes operated to refill space that had already filled and then been emptied previously during the same season.⁶⁴

The definitive 1946 report entitled "Water Supply For Palisades Reservoir Project" ("1946 Palisades Water Supply Report") studied the water supply problem in detail and was relied upon as the authoritative analysis during congressional hearings on

⁶¹ 1935 Storage Investigations Report at 173 (Orr Aff., Exhibit 32); *see also id.* at 174 ("Storage replenishment at American Falls Reservoir is one million seven hundred thousand (1,700,000) acre feet."); *id.* at 179 ("Surplus water available for storage in South Fork reservoirs is represented by American Falls storable inflow as defined the preceding table less 1,700,000 acre feet for American Falls reservoir and 175,000 acre feet for Henry's Fork reservoirs").

⁶² REPORT ON UPPER SNAKE RIVER (SOUTH FORK) STORAGE INVESTIGATIONS – GRAND VALLEY RESERVOIR, (United States Dep't of the Interior, Bureau of Reclamation) (Project Investigations Report No. 34-A) (Aug. 1940), at 3, 32-40 (Orr Aff., Exhibit 34). The Palisades project was initially referred to as "Grand Valley" project, but the name was later changed to "Palisades" to avoid confusion with a Colorado project. "Palisades Project," by Wm. Joe Simonds (Bureau of Reclamation) (1995), at 9. (This document is available under the "Palisades Project History" link at http://www.usbr.gov/projects/Project.jsp?proj_Name=Palisades Project.)

⁶³ 1935 Storage Investigations Report at 143 (Orr Aff., Exhibit 32).

⁶⁴ *Id.* at 157.

the project.⁶⁵ It reported that “[d]etailed studies were made of the water requirements for irrigation of lands under the existing canals diverting from the Snake River. . . . with all existing reservoirs and the proposed Palisades Reservoir in operation”⁶⁶ While the studies modeled two different operational scenarios (without the development of new lands – “Plan A” – and with the development of new lands – “Plan B”⁶⁷), both scenarios took into account “the amount of water accruing to the storage right” of the American Falls Reservoir each year.⁶⁸ Both modeling scenarios assumed that the maximum amount that could be stored under the American Falls storage right each year for irrigation purposes was 1,655,000 acre-feet.⁶⁹

Further, while the 1946 Palisades Water Supply Report specifically pointed out that under Idaho law “no water would accrue” to the Palisades Reservoir storage right in years “when the American Falls Reservoir storage right is not filled,”⁷⁰ it did not state that American Falls could also “refill” before Palisades could accrue any water. The 1946 report also contained other instances of explicit recognition that the senior

⁶⁵ See “Hearings Before A Subcommittee on Irrigation And Reclamation of the Committee on Public Lands, House of Representatives and a Special Subcommittee of the Committee on Interior and Insular Affairs, United States Senate” (Aug. 1949), at 92 (“A comprehensive study of water supply and use . . . was completed and a report released . . . in December 1946.”); “Palisades Dam And Reservoir Project In Idaho – Letter from the Secretary of the Interior transmitting A Supplemental Report on the Allocation and Repayment of Costs of the Palisades Dam and Reservoir Project in Idaho, Pursuant to Public Law 864, 81st Congress” (Nov. 27, 1950) (U.S. House of Representatives Document No. 720) (81st Congress, 2d Sess.), SUPPLEMENTAL REPORT – PALISADES DAM AND RESERVOIR PROJECT – IDAHO, at 7 (Orr Aff., Exhibit 53) (“A report covering the results of that investigation, entitled ‘Water Supply for Palisades Reservoir Project, Idaho’ . . . presented the results of extensive water supply studies of the upper Snake River valley . . .”).

⁶⁶ 1946 Palisades Water Supply Report - Substantiating Report at 114 (Orr Aff., Exhibit 33).

⁶⁷ *Id.* at 146-47.

⁶⁸ *Id.* at 150 (“Plan A”); *see also id.* at 159 (referring to “[t]he possible yield of each reservoir’s storage right under Plan B”).

⁶⁹ *See id.* at 152, 160 (numerical tables showing “Possible Yield of Reservoir Storage Rights With Water Conservation Program In Effect” for Plans “A” and “B,” respectively). The annual storage entitlement was displayed graphically in drawings on unnumbered pages following pages 152 and 160. *Id.* The 1946 Palisades Water Supply Report relied on a maximum annual irrigation yield of 1,655,000 acre-feet for the American Falls storage right, rather than its decreed and licensed annual quantity of 1,700,000 acre-feet, because 45,000 acre-feet was allocated to power use. *See id.* at 152 n.1, 160 n.1 (“Does not include power water storage right of 45,000 acre-feet.”).

⁷⁰ *Id.* at 85.

American Falls right would “fill” ahead of Palisades and other junior reservoir rights, but these included no hint of any priority right to also “refill” ahead of junior storage rights.⁷¹

The Bureau’s reports certainly would have identified any claim to a right to “refill” in priority, because such a right would have meant there was no unappropriated water available for storage in Palisades: all water in excess of the decreed quantity for American Falls would have been subject to its “refill” priority. It is inconceivable that such a possibility would not have been discussed in the Bureau’s own studies had the Bureau viewed the American Falls storage right as including a priority “refill” entitlement. Thus, the Bureau’s Palisades studies confirm that the storage water right for American Falls Reservoir was limited to a total quantity of 1.7 million acre-feet per year, with no right or entitlement to priority “refill.”

Further, the official record for the Palisades storage water right is clear that, as with American Falls, the right was applied for, permitted, and licensed on the basis of a maximum annual quantity that precludes any right to priority “refill.” The 1939 Palisades application stated that the “[q]uantity of water to be stored” was “1,400,000 acre feet per annum,”⁷² and the public notice of the application recited a quantity of “One million Four Hundred Thousand (1,400,000) Acre Feet per Annum.”⁷³ The 1962 certificate of completion of works recited (twice) an authorized storage quantity of 1,400,000 acre feet “per annum,”⁷⁴ and the 1973 water right license for the Palisades

⁷¹ See *id.* at 92 (“to fill the prior storage right of American Falls Reservoir”); *id.* at 110 (referring to storage “credited to the American Falls storage right, up to the amount needed to fill that right.”).

⁷² “Application For Permit To Construct A Reservoir And Appropriate The Public Waters Of The State Of Idaho,” Application no. R 26214, Permit No. R 670 (July 28, 1939) (Orr Aff., Exhibit 57) (underlining added).

⁷³ “Notice Of Application To Store And Appropriate Water In Accordance With The Provisions Of Chapter 145, 1935 Session Laws” (Orr Aff., Exhibit 58) (underlining added).

⁷⁴ “Permit No. R-670 – Certificate Of Completion Of Works” (Apr. 20, 1962) (Orr Aff., Exhibit 59) (underlining added).

storage right stated “the amount of water so stored and to which such right is entitled and confirmed . . . shall not exceed 1,200,000 acre feet per year.”⁷⁵

In sum, including a priority “refill” remark in the partial decrees for the American Falls and Palisades storage rights would impermissibly enlarge them far beyond the scope of their original entitlement. The State’s remark would not have this effect, because it makes “refill” operations subordinate to all other water rights.

C. Idaho Law Prohibits Decreeing A Storage Water Right That Authorizes Unsubordinated Storage “Refill” Under The Priority Of The Initial “Fill”.

Even if it were not clear from the official record that a priority “refill” remark would violate the original quantity limitations of the American Falls and Palisades storage rights, Idaho law prohibits decreeing a water right that authorizes unsubordinated storage “refill.” As a matter of Idaho law, “refill” storage must be fully subordinated to satisfy the requirement that storage rights be defined with a meaningful limit on the annual storage quantity.

1. The Quantity Element Of The American Falls And Palisades Storage Water Rights Must Define An Enforceable Annual Limit On The Amount Of Water That May Be Stored In Priority.

The Bureau may divert the waters of the Snake River to storage in the American Falls and Palisades reservoirs only pursuant to a valid Idaho water right. Idaho Code § 42-201; 43 U.S.C. § 383. The scope of a water right is defined and limited by its elements: ownership, source, quantity, priority date, point of diversion, purpose of use, period of use, place of use, conditions of use, and any remarks necessary to define, clarify or administer the water right. Idaho Code § 42-1411(2); *see also id.* § 42-1412(6) (“The

⁷⁵ “License Of Water Right,” License No. R-670/01-2068 (Mar. 19, 1973) (Orr Aff., Exhibit 60) (underlining added). The license also authorized an additional 200,000 acre feet “of inactive or dead storage.” *Id.*

decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable.”) Quantity and priority are the “essential elements” of a water right. *Memorandum Decision And Order On Challenge, Subcase Nos. 74-15051, et al (“High Flow” Claims) (“Lemhi High Flows Order”)*, at 17 (quoting *State v. ICL*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998)).

An Idaho water right must be defined “in terms of quantity of water per year,” a requirement that is “essential to the establishment and granting of a water right.” *A&B Irr. Dist. v. ICL*, 131 Idaho 411, 416, 958 P.2d 568, 573 (1997). Storage water right quantities are typically defined in terms of a maximum annual volume, such as acre-feet per year such terms, as in this case.⁷⁶ The Director recommended the storage water rights for American Falls and Palisades reservoirs be decreed with quantity elements of 1,672,590 acre-feet per year,⁷⁷ and 1,200,000 acre-feet per year,⁷⁸ respectively.

The maximum diversion rate and annual diversion volume methods both satisfy the overarching requirement that water rights be defined “in terms of quantity of water per year.” *A&B Irr. Dist.*, 131 Idaho at 416, 958 P.2d at 573. The need for a firmly

⁷⁶ Water rights for direct diversion of natural flow to immediate beneficial use, in contrast, are typically quantified in terms of a maximum diversion rate (typically cubic feet per second, or “cfs”). The “quantity of water per year” defined by such a right, *A&B Irr. Dist.*, 131 Idaho at 416, 958 P.2d at 573, is the volume of water that would be diverted under the maximum rate over the entire duration of the period of use.

⁷⁷ *Director’s Report, Subcase No. 01-2064*. While the originally licensed quantity for the American Fall storage right was 1.7 million acre-feet, the Director recommended a quantity of 1,672,590 acre-feet per year, *Stipulation* at 3-4, because by 1979 the reservoir’s active storage capacity had diminished to that level. PROJECT HISTORY – MINIDOKA AREA PROJECTS, IDAHO – WYOMING, 1979 CALENDAR YEAR, at 225 (Orr Aff., Exhibit 35). All parties except the City of Pocatello have stipulated that the “winter water savings” provisions of the Palisades Contracts should be effectuated, in part, by decreeing two separate storage rights for American Falls Reservoir that have a total combined quantity equal to the originally licensed quantity of 1.7 million acre-feet, and with a remark providing that administration of the two rights will be limited to a quantity equal to the reservoir’s active storage capacity as measured at an elevation 4354.5ft. on the face of the dam. *Stipulation* at 3-4. If this Special Master agrees and recommends separate water rights for the “winter water savings,” those water rights should also include the “refill” remark proposed by the State’s *Motion*.

⁷⁸ *Director’s Report, Subcase No. 01-2068*.

defined annual quantity is obvious, particularly with respect to storage. The quantity of a water right must define a meaningful limit on its exercise, both to make it administrable and to give effective notice of how much of each year's water supply has been appropriated. Water users and managers must be able to rely on the decreed quantities to plan effectively for the upcoming year and to make the most efficient use of each irrigation season's water supply. Agriculture activities, water rights administration and reservoir operations all depend on the certainty and predictability afforded by having a clearly defined limit on the quantity that may be diverted each year under any given water right.

Thus, Idaho law requires that the "quantity" elements of the American Falls and Palisades storage water rights define an enforceable limit on the amount of water that may be stored each year under their respective priorities. A remark authorizing storage "refill" cannot satisfy this requirement unless it is subordinate to all existing and future water rights. Otherwise a "refill" remark would allow the right holder to monopolize the resource, as discussed below.

2. A Priority Refill Remark Would Violate Idaho Law By Transforming The American Falls And Palisades Storage Rights Into Un-quantified Water Rights.

A remark authorizing priority "refill" would allow continuing, open-ended diversions of an unlimited quantity of water to storage while the right remained in priority. If the American Falls and Palisades storage water rights included a priority "refill" remark, diversions to storage could continue even after the decreed annual storage quantity had been reached, because any additional storage would simply be deemed a full or partial "refill" of the decreed quantity. Further, the priority of such a "refill" would mean junior natural flow diverters could be curtailed, and junior storage rights prevented

from ever filling at all, in order to store a volume of water in excess of the decreed quantity of the senior right. Even if the reservoir were completely refilled once, nothing would prevent the juniors from being curtailed again later in the season in order to allow a second “refill,” or a third, etc., of the senior’s storage. Water would be available to junior natural flow diverters and storage water rights only at the whim of the senior storage right holder, despite the fact that the senior right had already filled.

Thus, authorizing priority “refill” of the American Falls and Palisades storage water rights would effectively negate their quantity elements, transforming them into open-ended, un-quantified water rights to all flows in excess of the decreed quantities. Idaho law forbids such a result. As the Idaho Supreme Court has held, and the SRBA Presiding Judge recently emphasized, Idaho water rights must be defined “in terms of quantity of water per year.” *A&B Irr. Dist.*, 131 Idaho at 416, 958 P.2d at 573; *Lemhi High Flows Order* at 10. This requirement “is essential to the establishment and granting of a water right.” *Id.* Language that effectively eliminates the quantity element “vitiates the existence of a legal water right.” *State v. ICL*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998). An un-quantified water right encourages waste while preventing juniors from putting the water to beneficial use. *See Village of Peck v. Denison*, 92 Idaho 747, 750, 450 P.2d 310, 313 (1969) (“if the decree awards an uncertain amount of water to one appropriator whose needs are vague and fluctuating, it is likely that he will waste water and yet have the power to prevent others from putting the surplus to any beneficial use.”).

3. A Priority “Refill” Remark Would Effectively Create Water Rights For “Excess” Flows In Violation Of Idaho Law.

Idaho law is also clear that “excess water cannot be decreed as a water right.” *Lemhi High Flows Order* at 10.

Excess flow is not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right. . . . excess water inherently relates to water that has not been decreed. Consequently there cannot be a prior relation to excess water.

A & B Irr. Dist., 131 Idaho at 416, 958 P.2d at 573. A priority “refill” remark would violate these basic principles, because all flows in excess of the decreed quantities of the American Falls and Palisades storage rights would remain subject to those rights under their original priorities. Further, as discussed in a subsequent section, “refill” operations in Water District 1 have historically been dependent upon high flows and excess or surplus water.⁷⁹ Including a priority “refill” remark in the American Falls and Palisades storage rights would convert the opportunistic use of such windfalls into a priority right to any and all flows in excess of the decreed quantities. This result is contrary to Idaho law for the reasons Judge Wildman explained in his recent decision in the *Lemhi High Flows Order*.

Recognizing a priority right to “excess” flows would mean the amount of water available each year to holders of junior rights for natural flow and storage would be anyone’s guess. The predictability and stability of the system, which is critical to agriculture, water rights administration, efficient water use, and reservoir operations, would be seriously undermined and long-settled expectations thrown into doubt. Such a result would be contrary to “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources,” *Clear Springs Foods, Inc.*, 150 Idaho at 809, 252 P.3d at 89 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960)), and at odds with “the constitutionally enunciated policy of

⁷⁹ See *infra* Part IV.E.

optimum development of water resources in the public interest.” *Baker*, 95 Idaho at 583, 513 P.2d at 635.

C. **The State’s Proposed Refill Remark Is Consistent With Idaho Law Because It Subordinates Storage Refill To Existing And Future Water Rights.**

The State’s proposed remark avoids the legal pitfalls of priority “refill” and gives proper effect to the quantity elements of the American Falls and Palisades storage water rights. The State’s remark subordinates storage “refill” to all existing and future water rights, and thus would authorize diversions to storage in excess of the decreed quantities only if all other water rights had also been filled. The State’s remark would ensure that junior natural flow rights would not be curtailed, and junior storage not be prevented from filling, in order to store amounts in excess of the decreed quantities at American Falls and Palisades. Further, the State’s remark would not create an open-ended priority entitlement to “excess” water or “high flows.” In sum, under the State’s remark, the quantity elements of the American Falls and Palisades storage water rights would remain meaningful limitations on their exercise, and would firmly define the water rights “in terms of quantity of water per year.” *A&B Irr. Dist.*, 131 Idaho at 416, 958 P.2d at 573; *Lemhi High Flows Order* at 10.

The State’s “refill” remark also would preserve the predictability and stability of the existing system, which is essential to agricultural planning and production, efficient water use, and orderly water rights administration. Further, the State’s remark would still allow opportunistic storage “refill” operations in years when water is available in excess of the amount needed to satisfy all other rights. Thus, the State’s remark effectuates “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources,” *Clear Springs Foods, Inc.*, 150 Idaho at 808, 252

P.3d at 89 (internal quotation marks and citation omitted), and Idaho’s “constitutionally enunciated policy of optimum development of water resources in the public interest,” *Baker*, 95 Idaho at 583, 513 P.2d at 635.

Moreover, the State’s remark is consistent with the requirement that the use of excess flows to “refill” storage must be subordinated to both existing and future water rights. As the SRBA Presiding Judge explained in the recent Lemhi “High Flows” decision, subordination of the use of “excess” water or “high flows” must be complete and unqualified to be consistent with the Idaho Supreme Court’s decisions in *A&B* and *ICL*. See *Lemhi High Flows Order* at 24-26 (“The Special Master did not err in subordinating the high flow use to all existing and future rights”).

In the Lemhi order, Judge Wildman rejected the argument that the use of excess water or high flows should be subordinate only to water rights within the Lemhi Basin, explaining that such limited subordination “would make the otherwise unappropriated high flow water unavailable for appropriation by out-of-basin users,” resulting in the high flow users “acquiring a better interest in the water as against those out-of-basin users holding valid water rights.” *Lemhi High Flow Order* at 25. “The direct consequence” of so limiting the subordination, the Judge explained, “*de facto* elevates the status of high flow use to that of a water right.” *Id.* This would have been contrary to the principle that “excess water cannot be decreed as a water right.” *Lemhi High Flows Order* at 10 (citing *A & B Irr. Dist.*).

Similarly, in this case, limiting the subordination of “refill” operations to only existing water rights, the effect would be to give the American Falls and Palisades storage rights “a better interest in the [excess] water” than future appropriators,

effectively “elevat[ing] the status of high flow use to that of a water right.” *Lemhi High Flows Order* at 25. Thus, for the same reasons the SRBA Presiding Judge articulated in the Lemhi “High Flows” decision, any “refill” remark to be included in the American Falls and Palisades storage water rights must, as a matter of Idaho law, be fully subordinated to existing and future water rights.

In sum, a remark authorizing “refill” of the American Falls and Palisades storage water rights is necessary to define, clarify and administer the rights. Idaho law requires that any such remark make “refill” subordinate to all existing and future water rights. The State’s “refill” remark satisfies these requirements, while the priority “refill” remark contemplated by the Surface Water Coalition is entirely contrary to Idaho law. Accordingly, the State is entitled to summary judgment as a matter of law on the third count of the State’s *Motion*.

D. “Historical Practices” Alone Are Insufficient As A Matter Of Law To Support A Priority “Refill” Remark.

The only basis any party has identified for a remark authorizing “refill” in priority is the asserted need to preserve a “historical practice.”⁸⁰ Even if priority “refill” is a

⁸⁰ *Standard Form 1 Objection, Subcase No. 1-2064* (United States Bureau of Reclamation) (Apr. 19, 2007), at 4; *Standard Form 1 Objection, Subcase No. 1-2068* (United States Bureau of Reclamation) (Apr. 19, 2007), at 3. The Bureau’s objections also referenced the need to maximize the water supply available for use above Milner Dam, which unquestionably is a well-established historical practice, and which the the State has strongly supported, not only in these subcases but also in Subcase No. 02-0200 (Idaho Water Resource Board’s claim for a water right for the “Milner Zero Minimum Flow”) and in the judicial review proceedings on the licensing of the hydropower facility at Milner Dam. *Twin Falls Canal Co. & North Side Canal Co. v. Spackman (In the Matter of Licensed Water Right No. 01-7011 in the Name of Twin Falls Canal Co. & North Side Canal Co.)*, Case No. CV-2010-5377 (Idaho 5th Jud. Dist., Twin Falls County) (Judgment entered Aug. 30, 2011). Maximizing the water supply available above Milner is far more than a just a “historical practice,” however. It is also a provision of the State Water Plan (the “Milner Zero Minimum Flow”) and has been codified in Idaho Code § 42-203B(2). In contrast, the asserted “historical practice” of priority “refill” has no support in Idaho law, and as discussed in the next section, very little factual support in the history of federal reservoir operations and state water rights administration in the upper Snake River basin.

“historical practice” – which it is not, as official records conclusively demonstrate⁸¹ – “historical practice” alone is insufficient as a matter of law to justify a priority “refill” remark.

In Consolidated Subcase No. 00-92026, the SRBA Court was presented with the question of whether “historical practices” alone were sufficient to support a remark subordinating hydropower water rights to water rights for all other uses.⁸² Judge Melanson explained that “historical practices” do not constitute “a separate legal basis for modifying existing rights and requiring that the historical method of administration be continued. . . . if historical practices of administration, without a supporting legal doctrine, were to be controlling a significant purpose of the adjudication would be undermined.” *Order Deconsolidating Subcase 00-92026 And Order Of Recommitment To Special Masters, Consolidated Subcase No. 00-92026* (Jul. 1, 2008), at 3.

Thus, the contention that a priority “refill” remark is necessary simply because such has been a “historical practice” fails as a matter of law. “Historical practices” alone are insufficient to support inclusion of such a remark. A separate legal basis or doctrine must also apply and support a priority “refill” remark, but no party has identified any such authority. Further, as previously explained, Idaho law clearly prohibits such a

⁸¹ See *infra* Part IV.E.

⁸² The remark at issue in Consolidated Subcase No. 00-92026 was as follows:

The appropriator shall exercise this right in a manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of others to the use of water for other purposes. The appropriator shall not make a delivery call for hydropower generation except as against junior hydropower rights.

Order Separating And Consolidating Common Issue From Subcases In Exhibit “A” On Remark Regarding Subordination Of Hydropower Rights Based On “Historical Practices,” Consolidated Subcase No. 92-26 [00-92026] (Oct. 22, 2007), at 2.

remark. Accordingly, the question of “historical practices” is factually immaterial and legally insufficient to preclude summary judgment in these subcases.

The Court need go no further and need not consider “historical practices.” Even if this were not the case, the State would be entitled to summary judgment as a matter of law on the third count of the State’s *Motion*, for the reasons discussed below. The remaining portion of this brief includes additional information regarding historic reservoir “refill” operations and water right administration in the upper Snake River basin. This material was gathered from official government records that have been available to all parties since this litigation began nearly five years ago and confirms the conclusions of law set forth above.

E. The State’s Proposed Refill Remark Is Consistent With Historic Federal Reservoir Operations And State Water Rights Administration In The Upper Snake River Basin.

The Bureau has historically operated American Falls and the other federal reservoirs in the upper Snake River basin to capture and hold as much water as possible each year. This operational practice has its roots in the settled principle that maximizing agricultural use and storage above Milner Dam is the key to the optimum development of the waters of the Snake River basin.

The Milner principle was initially articulated in 1920 by the “Board of Engineers,” the first group to systematically address planning for the development of the Snake River “on a broad and comprehensive basis which would insure to the state the maximum utility of the possibilities of the stream.”⁸³ The principle of maximizing

⁸³ REPORT OF BOARD OF ENGINEERS TO CONSIDER PROJECTS IN SNAKE RIVER VALLEY WHICH MAY AFFECT THE PROPOSED AMERICAN FALLS RESERVOIR, IDAHO (Apr. 10, 1920), Report at 3 (Orr Aff., Exhibit 36). The Board of Engineers was convened by the Governor of Idaho and the United States Bureau of Reclamation to consider water projects in the Snake River Valley, particularly those affecting the

conservation and storage above Milner Dam formed the basis for water use, administration and development in the upper Snake River basin throughout the remainder of the twentieth century, was incorporated into the State Water Plan as the “Milner Zero Minimum Flow,” and was also codified by the Legislature in Idaho Code § 42-203B(2).⁸⁴

Accordingly, there has historically been virtually universal support among water users for operating the reservoir system to store as much water as possible above Milner Dam each year. Such operations sometimes resulted in holding more than 1.7 million acre-feet in American Falls Reservoir,⁸⁵ in physically “refilling” the reservoir (either in part or in full) during a given season,⁸⁶ or in maintaining a full reservoir even when stored water was being drafted.⁸⁷ None of this injured water users below Milner Dam,

proposed American Falls Reservoir, and was composed of representatives of the Twin Falls Canal Company, the North Side Canal Company, and the state and federal governments *Id.* at 1-2. The Board reported that “the greatest use of the water of Snake River will be found in the dedication of the entire flow of the stream to irrigation in so far as the water can be economically appropriated,” and that it was possible “with the requisite storage to utilize a very large percentage of all the waters originating in the watershed above Milner dam.” *Id.* at 5; *see also id.*, Transmittal Letter at 2 (“The board is of the opinion that all of the water of Snake River susceptible of economical diversion should be dedicated to irrigation”). The Board explained that because Milner Dam was the lowest point on the river at which large-scale diversions were practicable, *id.*, Transmittal Letter at 2, and that river flows were the limiting factor in agricultural development, *id.* (Report) at 5, “[t]he net effect . . . will be to dry up the river below Milner Dam during the irrigation season, also to as great an extent as possible below American Falls Reservoir, during the non-irrigation season.” *Id.*

⁸⁴ This point is discussed and supported in detail in the “Statement of Facts” in pages 4-25 of the *Memorandum In Support Of Idaho Water Resource Board’s Motion For Summary Judgment For Partial Decree Of Water Right For Miner Zero Minimum Flow*, filed in Subcase No. 02-200 on October 7, 2011.

⁸⁵ *See, e.g.*, WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, 1928, at 27 (Orr Aff., Exhibit 37) (“1,711,760 acre-feet”); WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, 1942, at 25 (Orr Aff., Exhibit 41) (“1,716,890 acre-ft.”); WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1962, at 21 (Orr Aff., Exhibit 38) (“1,730,000 acre-feet”)

⁸⁶ *See, e.g.*, WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1944, at 3 (Orr Aff., Exhibit 1) (“Regulation began May 14 and by June 1 about 110,000 acre-ft. had been withdrawn from American Falls Reservoir. The reservoir refilled, however, and regulation was finally resumed on July 5.”); Letter from Watermaster Lynn Crandall to H.R. Stinson of the Bureau of Reclamation (Aug. 2, 1952) (Orr Aff., Exhibit 39) (“In some years the reservoir has filled, then storage draft occurred, and later more water became available for storage that in some years refilled the reservoir and in some did not entirely refill it”).

⁸⁷ *See* WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1942, at 25 & hydrograph (Orr Aff., Exhibit 41) (stating no charges were made for storage use prior to June 2 & showing reservoir being held at full capacity from mid-April to June 2).

because they had no right to the high flows and surplus water supplies that made such reservoir operations possible.⁸⁸

For the same reasons, surplus flows conferred considerable benefits in water rights administration and accounting above Milner Dam. Water use typically was not regulated and storage use not charged until surplus flows had been exhausted – that is, until “the Milner spill” had ended – and American Falls Reservoir began to drop because of summer storage demands.⁸⁹

Storage use accounting practices handled such surpluses in several different ways over the years. Most commonly, surplus flows allowed the watermaster to postpone the start of the regulation period and make no charges against spaceholder accounts for storage water used before the Milner spill ended and American Falls Reservoir began

⁸⁸ This view was confirmed in the Milner Zero Minimum Flow of the State Water Plan, and in the 1986 amendment to Idaho Code § 42-203B(2), which provides, in part:

For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

⁸⁹ See, e.g., WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1944, at 3 (Orr Aff., Exhibit 1) (“Regulation began May 14 and by June 1 about 110,000 acre-ft. had been withdrawn from American Falls Reservoir. The reservoir refilled, however, and regulation was finally resumed on July 5.”); WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1938, at 2 (Orr Aff., Exhibit 40) (“1,310,000 acre-feet of surplus waters spilled to waste past Milner”); WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1942, at 25 (Orr Aff., Exhibit 41) (“STORED WATER DELIVERIES . . . No storage charges [for American Falls] prior to June 2 as water was spilling past Milner to waste until then”); WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1967, at 2 (Orr Aff., Exhibit 42) (“With the heavy precipitation in June and July and delayed snowmelt there was sufficient normal flow to supply all needs for water through July 11. The Milner spill was cut off on that date with all reservoirs full.”); WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1968, at 2 (Orr Aff., Exhibit 43) (“The Milner spill was cut off on June 21.”); WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1945, at 1-2 (Orr Aff., Exhibit 44) (“All reservoirs filled to capacity and storage use did not begin until July 9, when draft started at American Falls. Draft on the upper reservoirs did not begin until later dates.”). It is still standard practice in Water District 1 to cancel any storage use charges incurred prior to the end of the Milner spill. See Olenichak Depo. At 83-84 (Orr Aff., Exhibit 9) (“But as they were spilling water past Milner for flood control or whatever reason, storage usage was cancelled, just as it is today.”)

dropping.⁹⁰ At other times, surplus flows would be allocated as “refill” to spaceholders who had already used some of their storage allotment,⁹¹ or, alternatively, be deemed to have “cancelled” prior charges against spaceholder storage accounts,⁹² and at other times surplus flows were not allotted or credited to the spaceholders at all.⁹³ In any event, it was assumed that the surplus flows would eventually be stored in future reservoirs.⁹⁴

While these practices were originally intended simply to allow for the opportunistic use of surplus flow by storing it in available reservoir space and/or allowing

⁹⁰ See Olenichak Depo. At 82 (Orr Aff., Exhibit 9) (“[Prior to 1978] I don’t think the watermaster began his administration until they had reached the point of maximum reservoir contents in many of the years”).

⁹¹ See, e.g., WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1941, at 28 (Orr Aff., Exhibit 45) (“The refill April 23 to June 12 was apportioned among the canals who had used storage during that period in proportion to storage used”); WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1942, at 27 (Orr Aff., Exhibit 41) (“This refill was divided up among the various projects in proportion to their use of storage up to June 15”); see also WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1937, at 25 (Orr Aff., Exhibit 46) (“The 24,630 acre-feet in excess of reservoir capacity was allotted to the canals drawing storage prior to June 8 . . . not exceeding [their] storage draft up to June 8.”).

⁹² See, e.g., WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1953, at 30 (Orr Aff., Exhibit 2) (“The [storage use] figures do not include 182,000 acre-feet used from American Falls and 13,700 acre-feet from Jackson Lake during May, which were canceled out due to those reservoirs filling again during June to full capacity.”); WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1946, at 11 (Orr Aff., Exhibit 5) (“About 44,000 acre-feet of storage were withdrawn from American Falls Reservoir May 15-27 to fill downstream demands. The reservoir subsequently refilled, however, so no charge against storage allotments was made for the stored water used in May.”); 1944 ANNUAL PROJECT HISTORY, MINIDOKA PROJECT, at 17 (Orr Aff., Exhibit 47) (“American Falls filled on March 16, with storage releases beginning on May 16. The reservoir refilled on June 8, cancelling previous storage charges”).

⁹³ See, e.g., WATER DISTRIBUTION AND HYDROMETRIC WORK IN DISTRICT NO. 36, 1928, at 27 (Orr Aff., Exhibit 37) (“The excess over the normal capacity of 1,700,000 acre-feet . . . was not prorated to individual canal owners.”); WATER DISTRIBUTION AND HYDROMETRIC WORK IN DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1936, at 21 (Orr Aff., Exhibit 6) (“Both Jackson Lake and American Falls reservoirs filled and all rights were 100% filled. Both reservoirs reached points during the high water slightly in excess of their rated capacity but such excess was not allotted.”); WATER DISTRIBUTION AND HYDROMETRIC WORK IN DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1938, at 25 (Orr Aff., Exhibit 40) (“Both Jackson Lake and American Falls Reservoir rose to heights slightly above their rated capacities, but such extra water was discharged as natural flow and computed storage drafts did not begin until the reservoirs had dropped to their regular capacities of 847,000 and 1,700,000 acre-feet respectively.”).

⁹⁴ See, e.g., WATER DISTRIBUTION AND HYDROMETRIC WORK IN DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1936, at 9 (Orr Aff., Exhibit 6) (“It is a matter of regret that lack of storage facilities resulted in the waste of 620,000 acre-feet of surplus flood waters past Milner. About one-fourth of this waste could have been retained if the reservoirs now under construction at Island Park and Grassy Lake had been completed.”); WATER DISTRIBUTION AND HYDROMETRIC WORK IN DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1937, at 13 (Orr Aff., Exhibit 46) (“Surplus water spilled past Milner during the year in excess of the Idaho Power Co. regular rights amounted to 382,000 acre-feet of which about 150,000 acre-feet could have been retained in Island Park and Grassy Lake if those reservoirs had been completed.”).

spaceholders to avoid being charged for some of their storage water use, in 1954 Watermaster Lynn Crandall changed course and stated that refilling American Falls Reservoir was “a prior right to Palisades reservoir,” and that American Falls spaceholders should “enjoy the privilege of refilling their right to the same extent that they could have done prior to the construction of the Palisades reservoir.”⁹⁵ Watermaster Henry Eagle, who succeeded Crandall a few years later, adhered to this practice during his tenure, in the 1960s.⁹⁶ Eagle recognized that the question of whether American Falls had a priority right to refill was open to dispute,⁹⁷ but apparently did not consult with the State Reclamation Engineer or seek a legal opinion. In contrast, the succeeding watermaster, Art Larsen (who took over in mid-1969), promptly sought guidance on this important question.

In letter dated March 6, 1970, State Reclamation Engineer R. Keith Higginson responded to the new watermaster’s request for guidance:

You have recently asked for direction concerning the storage rights in American Falls Reservoir. . . .

Once filled each season, American Falls Reservoir should not be allowed to refill at the expense of junior water users Once American Falls Reservoir has been filled either physically or with upstream credits, storage should be restricted to filling all junior rights. Therefore, the practice of filling American Falls Reservoir with a subsequent drawdown and then calling on water in other reservoirs to refill American Falls, should not be allowed to continue.⁹⁸

⁹⁵ WATER DISTRIBUTION AND HYDROMETRIC WORK IN DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1954, at 16 (Orr Aff., Exhibit 48). Crandall’s discussion of the question was brief and not entirely clear. While he initially stated “refill” was a “prior” right, he also characterized it as a “privilege,” and acknowledged that it resulted in an “enlarged” annual use of water. *Id.*

⁹⁶ WATER DISTRIBUTION AND HYDROMETRIC WORK IN DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1967, Appendix at VIII (Orr Aff., Exhibit 42) (“the attempt is to preserve for American Falls reservoir the storage rights it was entitled to prior to the time of the later reservoirs”).

⁹⁷ Eagle acknowledged: “One point of view is that after the reservoir once fills it should not be permitted to store further water during that season.” WATER DISTRIBUTION AND HYDROMETRIC WORK IN DISTRICT NO. 36, SNAKE RIVER, IDAHO, 1967, Appendix at VIII (Orr Aff., Exhibit 42).

⁹⁸ Letter from R. Keith Higginson, State Reclamation Engineer, to Mr. Art Larsen, Watermaster, Water District No. 36, at 1-2 (Mar. 6, 1970) (Orr Aff., Exhibit 49) (underlining added). Higginson stated there was one exception to the rule against refilling American Falls Reservoir in priority, based on his conclusion

Higginson's 1970 decision ended the short-lived practice of "refilling" American Falls storage in priority, i.e., ahead of the first fill of junior reservoir storage rights such as Palisades. Higginson's instructions were confirmed and further implemented in 1978 in connection with that year's comprehensive modernization of water rights administration equipment, procedures and practices in Water District 1, which was in large part a water user-driven response to the 1977 drought:

The drought of 1977 marked the end of an era in Water District 1. It became apparent that the development of the Upper Snake had reached the point where the past methods of water allocation could no longer assure the delivery of each water user's legal entitlement. . . .

In response to a request from the American Falls Reservoir District, Twin Falls Canal Company, and the North Side Canal Company, staff from the Idaho Department of Water Resources with the assistance of the USBR and Water District 1 personnel commenced an inventory of all headgates and measuring devices The Director of the IDWR agreed to allocate a portion of available drought relief funds to provide gage houses and stage recorders 46 gaging stations constructed to USGS specifications were installed during the inventory, many headgates and measuring devices were found to be unsatisfactory and most of the owners have made the necessary improvements. Pump diversion[s] inventoried were also required to have adequate measuring devices. This diversion inventory also included a review of all water rights associated with each diversion. Many questions have been raised regarding specific water rights which will take additional time and effort to resolve. . . .

The IDWR installed computer equipment in the Idaho Falls regional office and the USBR office in Burley which would aid in the

that the *Eagle Decrees* established a "storage right . . . under Water License No. 15134." *Id.* This conclusion was incorrect as a matter of law because, as the Presiding Judge has held, "[t]he Eagle Decree did not adjudicate any water rights or other administrative provisions." *Order On Motion To Alter Or Amend* at 5. Further, as previously discussed, water right no. 15134 was applied for and perfected as a right for direct diversion of natural flow, not as a storage right. Woodville Decree at 27 (Orr Aff., Exhibit 16). Moreover, the plain language of the *Eagle Decrees* provided that Water License No. 15134 would be effective as a "storage right" only if the United States applied for and obtained an amendment to the license authorizing diversions into storage of any amount in excess of the 1,700 c.f.s. of natural flow assigned to American Falls Reservoir District No. 2. *Supplemental Decree, Burley Irr. Dist. v. Eagle*, (Idaho 5th Jud. Dist., Jul. 10, 1968), Exhibit D at 34-35 (Orr Aff., Exhibit 50). There is no record that any such amendment was sought or approved, and in any event no proof of beneficial use of any amount in excess of 1,700 c.f.s. was ever made. In the SRBA, the water right claim that derives from Water License No. 15134 is pending in Subcase No. 01-0006, which was claimed and recommended as a natural flow right of 1,700 c.f.s. No party objected to this quantity figure, nor did any party object that it is a storage right that benefits all spaceholders rather than a natural flow right that benefits only American Falls Reservoir District No. 2.

computerization of Water District 1 operation. Work started in 1976 by Alan Robertson and Bob Sutter of the IDWR Hydrology Section in Boise to computerize water distribution was stepped up to develop a computer allocation system that would allow water rights in Water District 1 to be delivered by a method that would provide prompt daily information and more accurately follow the actual hydraulic conditions on the river.⁹⁹

The Committee of Nine adopted a resolution requesting that the watermaster implement the contemplated changes to established water distribution practices “as will result in more accurate deliveries of natural flow and stored water, [and] improved regulation procedures to assure deliveries of all water rights by priority.”¹⁰⁰ The annual watermaster’s report documented a number of important aspects of the new system, including confirmation there was no priority “refill” of reservoir storage:

Each of the reservoir rights can be filled only to the maximum volume specified in the right. When stored water is released from a reservoir, thus making room for additional storage, the amount accumulated in that space is not adjusted downward until the end of the season. This prevents a second fill at the expense of later rights. . . .¹⁰¹

[T]he Water District 1 accounting process credits all available natural flow to the reservoirs according to priority of right, until each storage right is filled. This procedure is complicated by BOR flood control operations. This dilemma is handled by allowing the reservoir to refill as long as there is water in excess of all other rights. The second fill is defined as “unaccounted for storage” and is credited back to the reservoirs pursuant to the instructions of the storage right holder, i.e., the Bureau of Reclamation.¹⁰²

The Director of IDWR explained in a 1979 Committee of Nine meeting that this means the once the a storage water right has filled “on paper,” its priority is “no longer in effect”:

⁹⁹ WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 01, SNAKE RIVER, IDAHO, 1978, at 1-2 (Orr Aff., Exhibit 51).

¹⁰⁰ WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 01, SNAKE RIVER, IDAHO, 1978, at 3 (Orr Aff., Exhibit 51).

¹⁰¹ WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 01, SNAKE RIVER, IDAHO, 1978, at 15 (Orr Aff., Exhibit 51) (underlining added).

¹⁰² WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 01, SNAKE RIVER, IDAHO, 1978, at 30 (Orr Aff., Exhibit 51) (underlining added).

[Chairman] Lester Saunders asked the Director of the Department of Water Resources, Stephen Allred, to explain the watermaster's process for crediting water to the reservoirs. Steve explained that any water available at a reservoir for storage is credited to that reservoir storage right. Once a right is filled on paper, even if water has been released and additional space is available, the priorities of the reservoirs are considered to be no longer in effect. This is offset by the fact that any diversion which takes over its natural flow entitlement is charged with storage used. Steve explained that there are alternatives to this approach, but this is the best accounting method for showing "what is happening" in the system. Steve stressed that the computer only does the accounting and does not eliminate the need for human judgment.¹⁰³

Water District 1 still administers storage water rights under these principles.¹⁰⁴ A reservoir storage right is deemed filled when the quantity that has accumulated to storage under the right reaches the decreed annual volume, regardless of whether the reservoir has filled physically.¹⁰⁵ The Bureau's "refill" operations are administered as subordinate to all other water rights,¹⁰⁶ and thus refill is permitted to the extent available reservoir space can be filled with surplus or excess water.¹⁰⁷ This is consistent with the administration of water rights for direct diversion of natural flow, which may divert in priority only up to the limit of their authorized diversion rates – thereafter, their priorities also are "no longer in effect."

¹⁰³ Minutes Of Committee Of Nine Meeting (Sept. 21, 1979), at 1 (Orr Aff., Exhibit 52) (underlining added).

¹⁰⁴ Olenichak Depo. at 81-82 (Orr Aff., Exhibit 9) ("Q. And is it correct to say that it's your view that that's how it's been done since 1978 . . . ? A. Yes.").

¹⁰⁵ Olenichak Depo. at 15 (Orr Aff., Exhibit 9) ("A. . . . it's common for the physical contents [of the reservoir] not to match the water we've accrued [to the right] on paper.").

¹⁰⁶ Olenichak Depo. at 30 (Orr Aff., Exhibit 9) ("Q. And is that [allowing storage of additional water only if not at the expense of any water right holder] consistent with how refill occurs currently in Water District 1? A. Yes.").

¹⁰⁷ Olenichak Depo. at 116-17 (Orr Aff., Exhibit 9) ("Q. So am I correct in concluding that that means the way Water District 1 has operated refill in your experience has been that refill is done using excess or surplus water? A. Yes, that's correct.").

In sum, the State's proposed "refill" remark is consistent with historic reservoir operations and water rights administration in the Upper Snake River Basin.¹⁰⁸ Decreeing the State's proposed "refill" remark in the American Falls and Palisades storage water rights would validate these historic practices and provide the authority necessary for them to be continued.

CONCLUSION

The undisputed facts and Idaho law conclusively demonstrate that: (1) the Idaho Supreme Court's *Pioneer* decision controls the question of the City of Pocatello's asserted ownership interest in the storage water right for Palisades Reservoir; (2) there should be no remark referencing the *Eagle Decrees* in the partial decrees for the American Falls and Palisades storage water rights; and (3) the State's proposed "refill" remark is necessary to define, clarify and administer the American Falls and Palisades storage water rights. For the reasons set forth herein, the State respectfully requests that this Special Master grant the State's *Motion*.

Respectfully submitted this 21st day of February 2012.

LAWRENCE G. WASDEN
Attorney General
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Deputy Attorney General

¹⁰⁸ Olenichak Depo. at 116 (Orr Aff., Exhibit 9) ("Q. . . . the remark . . . would recognize and authorize the type of refill that Water District 1 has been doing while you've been there, and it's consistent with how Water District 1 has operated, quote, "refill"? A. Yes.")

CERTIFICATE OF SERVICE

I certify that on this 21st day of February 2012, I caused to the foregoing MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT be filed with the Court and copies served on the following by the methods indicated:

1. Original to:

Clerk Of The District Court Snake River Basin Adjudication 253 Third Avenue North PO Box 2707 Twin Falls, ID 83303-2707	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Federal Express ☐ Facsimile: <u>(208) 736-2121</u>
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2. Copies to:

Special Master Terrence A. Dolan Case Administrator Diana Delaney Snake River Basin Adjudication 253 Third Avenue North PO Box 2707 Twin Falls, ID 83303-2707	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Federal Express ☐ Facsimile: <u>(208) 736-2121</u> ☒ E-Mail: <u>tdolan@id.courts.net</u> ☒ E-Mail: <u>ddelaney@id.courts.net</u>
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State Of Idaho Represented By: Natural Resources Div Chief State Of Idaho Attorney General's Office PO Box 44449 Boise, ID 83711-4449	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile: _____ ☐ E-Mail: ☒ Not applicable
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