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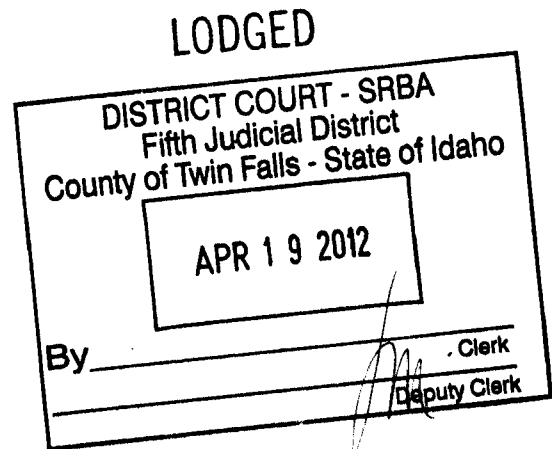
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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

Subcase Nos. Attachment A

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

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
INTRODUCTION	3
STATEMENT OF FACTS	5
I. History of Upper Snake River Basin Reservoir Development	5
II. The <i>Eagle Decree</i> and Parties to the Litigation.	6
III. The <i>Eagle Decree</i> Ratified and Confirmed Several Administrative Provisions that Were Included in the Palisades Contracts.....	7
IV. Director's Reports for Water Rights 01-2064 and 01-2068.....	11
V. Procedural Facts.....	12
STANDARD OF REVIEW	12
ARGUMENT	13
I. The Administrative Provisions Should be Included on the Partial Decrees for Water Rights 01-2064 and 01-2068.	13
II. Parties to the <i>Eagle Decree</i> are Bound by its Provisions and Cannot Challenge Them in the SRBA.....	21
III. Subsequent Appropriators are Bound by the <i>Eagle Decree</i> Administrative Provisions.....	23
CONCLUSION.....	27
CERTIFICATE OF SERVICE	29

COMES NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company, (hereinafter collectively referred to as the "Surface Water Coalition," "Coalition" or "SWC"), by and through their undersigned counsel of record, and hereby submit this memorandum in support of the *Joint Motion for Partial Summary Judgment* in the above subcases. As set forth below there are no genuine issues of material fact that the binding *Eagle Decree* is binding on the parties to that proceeding and that the referenced Palisades Contract provisions governing storage operations and administration are necessary as a matter of law. Accordingly, the Special Master should grant the Coalition's motion and recommend a remark for the storage water rights properly referencing these necessary administrative provisions.

INTRODUCTION

The Coalition seeks an order from the Special Master that certain provisions from the "Palisades Contracts" should either be included or properly referenced on the Partial Decrees for water rights 01-2064 and 01-2068.

In addition to adjudicating various water rights, the *Eagle Decree* confirmed that "the contracts entered into between various of the parties Plaintiff and the United States of America Bureau of Reclamation ... in connection with the Palisades project and other projects, were intended to be, and are, binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam and constitute a common plan for the administration of the Snake River." *Affidavit of David Stanish* at Ex. E at 19 (filed in subcase 01-2068 on August 18, 2009) ("*Stanish Aff.*").

In doing so, the *Eagle Decree* specifically identifies several of the necessary administrative provisions from those contracts. These provisions are necessary for the administration of water rights 01-2064 and 01-2068 and should, therefore, be included on the partial decrees as a matter of law. These provisions include:

- An agreement by entities to discontinue the practice of diverting water through their canal system through the winter months to allow for an increase of water available for the Palisades Reservoir. In exchange, the entities received senior storage priority in American Falls and Palisades Reservoirs. Ex. A, *Arrington Aff.* (*Eagle Decree*, Exhibit A);
- An exchange of storage water held by North Side Canal Company (“NSCC”) and Burley Irrigation District (“BID”) in Jackson Lake Reservoir, with storage water held by Upper Valley Water Users¹ in the American Falls Reservoir, *id.* at Ex. B (*Eagle Decree*, Exhibit B, Provisions 19 and 20);
- Authorization to temporarily hold storage water in any reservoir upstream of Milner Dam when necessary to conserve water; *id.* at Ex. C (*Eagle Decree*, Exhibit C, Provision 19a);
- An exchange of storage water held by the Minidoka Irrigation District (“MID”) in Jackson Lake for storage water in American Falls Reservoir and other provisions regarding MID’s designation of storage use, *id.* at Ex. D (*Eagle Decree*, Exhibit E, Provisions 21 and 22); and
- Requiring the measurement of surface and ground water diversions of waters that would otherwise flow into the American Falls Reservoir and administration of the storage rights consistent with the contract between Reclamation and Bureau of Indian Affairs (Michaud Project), *id.* at Ex. E (*Eagle Decree*, Exhibit F, Provisions 8a).

See also SWC Response Brief, Statement of Facts, Part IV (discussing importance of these administrative provisions in the development of the Palisades Contracts and in ensuring that the Palisades Project could be developed).

¹ “Upper Valley Water Users” is made up of the following entities: Aberdeen-Springfield Canal Company, Blackfoot Irrigation Company, Burgess Canal & Irrigating Company, Butte & Market Lake Canal Company, Corbett Slough Ditch Company, Dilts Irrigation Company, Ltd., Enterprise Canal Company, Ltd., Enterprise Irrigation District, Harrison Canal & Irrigation Company, Idaho Irrigation District, Lenroot Canal Company, New Sweden Irrigation District, Peoples Canal & Irrigation Company, Poplar Irrigation District, Progressive Irrigation District, Reid Canal Company, Rudy Canal Company, Ltd., Snake River Valley Irrigation District, Trego Ditch Company, Woodville Canal Company.

Since the above provisions are necessary for the administration of the storage water rights, each should either be properly reference on, or attached to, the partial decrees for water rights 01-2064 and 01-2068. The Coalition offers two alternatives to the remark presently recommended by IDWR.

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

or

The delivery of water to this right is subject to the procedures described in the United States Bureau of Reclamation spaceholder contracts, as amended in connection with the Palisades project and Minidoka project (attached hereto).²

STATEMENT OF FACTS

I. History of Upper Snake River Basin Reservoir Development.

The history of the development of the reservoirs in the Upper Snake River Basin is set forth in the “Statement of Facts” in the Coalition’s *Joint Memorandum in Opposition to the State of Idaho’s Motion for Partial Summary Judgment*, filed in this matter on April 16, 2012. The Coalition adopts and incorporates those facts as if set forth herein.

The development of the reservoirs, including the authorization and reauthorization of the Palisades Project, was the result of numerous meetings, negotiations, and agreements by all the spaceholders. The consideration given by the water users was necessary in order to move the new storage projects forward. The administrative provisions incorporated in those contracts, and

² A proposed copy of the provisions is attached to the Coalition’s *Motion for Partial Summary Judgment*.

confirmed in the *Eagle Decree* proceedings, provide the foundation for reservoir operations and administration of Reclamation's storage rights.

II. The *Eagle Decree* and Parties to the Litigation.

The *Eagle Decree* was issued by Judge Theron Ward of the Twin Falls County District Court on July 10, 1968, pursuant to a summary supplemental adjudication brought under I.C. § 42-1405 (1948).³ Ex. E, *Stanish Aff. (Eagle Decree)*; Ex. 23, *Thompson Aff.*⁴ (Findings of Fact, Conclusions of Law).⁵ On May 14, 1968, the plaintiffs entered into a *Stipulation* regarding certain facts and conclusions for purposes of entry of the *Eagle Decree*. *Thompson Aff.* at Ex. 22. The *Stipulation* acknowledged the water rights acquired by each entity or person and the cooperation, planning, and adjustment of rights related to the development of the Palisades Reservoir project. *Id.* The District Court issued orders confirming these facts and conclusions of law.

Parties to the *Eagle Decree* proceedings include many parties before the Court in this matter.⁶ They include the members of the Coalition, the City of Pocatello, and the members of the group referred to in these proceedings as the "American Falls Spaceholders:"

Aberdeen Springfield Canal Company, Blackfoot Canal Company (referred to in the *Eagle Decree* pleadings as Blackfoot Irrigation Company); Burgess Canal Company (referred to in the *Eagle Decree* pleadings as Burgess Canal & Irrigating Company), Butte & Market Lake Canal Company, Corbett Slough Ditch Company, Dilts Irrigation Company, Enterprise Canal Company, Enterprise Irrigation District, Harrison Canal Company (referred to in the

³ Now codified at I.C. § 42-1424.

⁴ The *Affidavit of Travis L. Thompson* ("*Thompson Aff.*") was filed on April 16, 2012, in association with the Coalition's *Joint Memorandum in Opposition to State of Idaho's Motion for Summary Judgment*.

⁵ In addition, a companion case, with the same parties, was filed in Fremont County to cover Snake River water users above Blackfoot. Ex. F to *Affidavit of David I. Stanish* (filed in subcase no. 01-2068 on August 18, 2009). As related to these proceedings, all pertinent provisions of the Twin Falls County *Eagle Decree* and the Fremont County *Eagle Decree* are identical. However, all references to the *Eagle Decree* herein will include citations to the Twin Falls County *Eagle Decree*.

⁶ Importantly, the Water District 1 Watermaster, Henry Eagle, was also a party to the case. Since entry of the decree the watermaster has been required to administer the storage water rights according to the provisions ordered by the District Court.

Eagle Decree pleadings as Harrison Canal & Irrigation Company), Idaho Irrigation District, Lenroot Canal Company, New Sweden Irrigation District, Osgood Canal Company, Peoples Canal & Irrigation Company, New Sweden Irrigation District, Reid Canal Company, Rudy Irrigation Company (referred to in the *Eagle Decree* pleadings as Rudy Irrigation Canal Company, Snake River Valley Irrigation District, Trego Ditch Company and Woodville Canal Company.

See Exs. 21-23, *Thompson Aff.*

III. The *Eagle Decree* Ratified and Confirmed Several Administrative Provisions that Were Included in the Palisades Contracts.

In addition to establishing prima facie rights to use water with an April 1, 1939 priority, the *Eagle Decree* “confirmed and ratified” several provisions that would govern administration of the upper Snake River reservoir system.

In the *Stipulation*, the parties specifically identified these provisions:

XVII

(a) That the contracts entered between various of the parties Plaintiff and the United States of America, Bureau of Reclamation, in connection with the Palisades and other projects, as amended and modified, were intended to be, and should be, binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries above Milner Dam; and although the provisions of said contracts provide the basis of a common plan for the administration of the waters of [the] Snake River, certain paragraphs of said contracts, common to all types of contracts with the various parties Plaintiff, contain the major areas of agreement.

Typical examples of the common paragraphs setting forth the major area of agreement are hereafter attached. A typical examples of the common paragraph relating to “Saving of Winter Water; Special Storage Right” is hereto attached, marked Exhibit A. A typical example of the paragraph relating to “Permanent Exchange of the American Falls and Jackson Lake Storage Rights and Redefinition of Storage Rights, is hereto attached, marked Exhibit B. A typical paragraph relating to “Temporary Storage and Exchange of Water; Release of Jackson Lake and Palisades for Power Production” is hereto attached, marked Exhibit C ...

(b) During the negotiation of the contracts entered between the various parties Plaintiff and the United States of America, Bureau of Reclamation, referred to in paragraph XVII(a), immediately above, it was necessary to make

special arrangements with the Minidoka Irrigation District for the purpose of effecting annual exchanges of water, as well as fixing the carry-over rights of said district in connection with Jackson Lake storage. ... The pertinent paragraphs of the contract entered by the United States of America, Bureau of Reclamation, and the Minidoka Irrigation District, the contents of which paragraphs were confirmed by all other various parties Plaintiff, in amendatory and supplemental contracts, are hereto attached and marked Exhibit E.

(c) In addition to the contracts entered between the various parties Plaintiff ... a Memorandum of Agreement between the Bureau of Reclamation and the Bureau of Indian Affairs was executed, setting forth special provisions relating to the water supply for the Michaud Division of the Fort Hall Indian Reservation, Idaho, by which Memorandum of Agreement, the Bureau of Indian Affairs agreed to be bound by these common provisions of the contracts of the various parties Plaintiff so that the Snake River above Milner Dam could be successfully and efficiently administered. The most pertinent paragraphs of this Memorandum of Agreement are hereto attached and marked Exhibit F.

Ex. 22 at 24-26, *Thompson Aff.*

Judge Theron Ward also included reference to each of these provisions from the Palisades Contracts, including them as Exhibits to the *Eagle Decree*:

4. That the contracts entered into between various of the parties plaintiff and the United States of America, Bureau of Reclamation, as the same have been amended and modified, in connection with the Palisades project and other projects, were intended to be, and are, binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam, and constitute a common plan for the administration of the Snake River.

5. That the following provisions of the contracts as amended, which provisions are common to each amended contract entered into between each party thereto, and the United States of America, Bureau of Reclamation, are hereby ratified, confirmed and approved:

(a) The provisions relating to "Saving of Winter Water; Special Storage Right." A copy of a typical example of such a common paragraph is attached hereto as Exhibit A and by this reference made a part hereof as though set out in full herein;

(b) The provisions relating to "Permanent Exchange of the American Falls and Jackson Lake Storage Rights and Redefinition of Storage Rights." A copy of a typical example of such a common

paragraph is attached hereto as Exhibit B and by this reference made a part hereof as though set out in full herein;

(c) The provisions relating to “Temporary Storage and Exchange of Water; Release of Jackson Lake and Palisades for Power Production.” A copy of a typical example of such a common paragraph is attached hereto as Exhibit C and by this reference made a part hereof as though set out in full herein.

...

6. That the pertinent paragraphs of the contract entered into by the United States of America, Bureau of Reclamation, and the Minidoka Irrigation District, the contents of which paragraphs were confirmed by all other parties Plaintiff in amendatory and supplemental contracts, a copy of which pertinent paragraphs is attached hereto as Exhibit E and by this reference made a part hereof as though set out in full herein, is hereby ratified, confirmed and approved.

7. That the Memorandum of Agreement between the Bureau of Reclamation and the Bureau of Indian Affairs, a copy of the pertinent provisions of which is attached hereto as Exhibit F and by this reference made a part hereof as though set out in full herein, is hereby ratified, confirmed and Approved.

Ex. 23, *Thompson Aff.*; see also, *Stanish Aff.*, Exs. E & F.

Through these the Palisades Contract provisions the following administrative procedures were established:

- Winter Water Savings (*Eagle Decree*, Ex. A) (Ex. A, *Arrington Aff.*): An agreement by certain entities to discontinue the long-held practice of delivering water through their canal system during the winter “to free up water for the new Palisades Reservoir.” See Ex. 41 (*Tony Olenichak Deposition* Tr. Vol. II, p. 209, lns. 2-20), *Thompson Aff.* In exchange for discontinuing this practice, the entities received senior storage space in Palisades Reservoir and American Falls Reservoir – designated as “first to fill” storage under a priority date of March 29, 1921. *Id.*; see also Ex. 29, *Thompson Aff.*

- Exchange Between Jackson Lake and American Falls Reservoir (*Eagle Decree*, Ex. B Provisions 19 & 20) (Ex. B, *Arrington Aff.*): This provision effected an exchange of storage space held by NSCC and BID in Jackson Lake Reservoir, with storage water held by Upper Valley Water Users⁷ in the American Falls Reservoir, Ex. 23, *Thompson Aff.*; *see also* Ex. 41, (Tr. Vol. II, pp. 219-221) (discussing the administration of the exchange provision); *id.* at 220-21 (when implemented, the exchange is part of the “water District’s administration of these storage rights at American Falls and Jackson”).

- Upstream Storage (*Eagle Decree*, Ex. C, Provision 19a) (Ex. C, *Arrington Aff.*): This provision allows “the practice of holding water in the reservoir system space that is furthest upstream in order to affect the greatest practical concentration of water.” Ex. 41, *Thompson Aff.* (Tr. Vol. II, p. 207, lns. 5-8). This provision describes Reclamation’s operations and the administration of storage water rights that continues today. *Id.* (Tr. Vol. II, p. 207, lns. 9-12).

- MID Exchange / Storage Provisions (*Eagle Decree*, Ex. E, Provisions 21 & 22) (Ex. D, *Arrington Aff.*): Provisions which allows MID to annually exchange storage held in Jackson Lake Reservoir with storage in American Falls Reservoir and designate the reservoir from which MID uses storage water. Ex. 41, *Thompson Aff.* (Tr. Vol. II, pp. 302-11) (discussing the exchange).

- Delivery of Water / Measurement / Storage Provision (*Eagle Decree*, Ex. F, Provision 8a) (Ex. E, *Arrington Aff.*): This provision requires measurements of surface and ground water diversions of waters flowing into the American Falls Reservoir and the corresponding administration of storage to account for such diversions. Ex. 41, *Thompson Aff.* (Tr. Vol. II, pp. 225-228) (discussing administration of provisions).

⁷ *See supra*, n.1.

IV. Director's Reports for Water Rights 01-2064 and 01-2068

Reclamation filed amended water right claims for American Falls (01-2064) and Palisades (01-2068) Reservoirs on December 1, 2006. Exs. 38 & 39, *Thompson Aff.* The Director's Recommendations were filed with the SRBA Court on December 16, 2006. The Recommendations include the following remarks:

(Under Place of Use): Place of use for irrigation storage and power storage is American Falls Reservoir,⁸ however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range, 21E, sections 28 and 29, when determined by the Department of Water Resources, the Water District advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner Dam.

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

(Under Other Provision Necessary): A portion of this right is designated as the first to fill for the benefit of the contract holders as provided in the provisions for saving winter water as recognized in the Burley Irrigation Dist. v. Eagle, Supplemental Decree (Idaho 5th Jud. Dist., July 10, 1968) and Aberdeen-Springfield Canal Co. v. Eagle, Supplemental Decree (Idaho 7th Jud. Dist., March 12, 1969).

Exs. G & H, *Arrington Aff.*

The Director's recommended remarks incorporate the administrative provisions identified above. Ex. 41, (Tr. Vol. II, pp. 209-12), *Thompson Aff.* (Winter Water Savings); at 221-22 (Exchange Provision); at 215, ll.16-24 (Upstream Storage); at 228, ll. 13-20 (Delivery of Water/Measurement)).

⁸ Water right 01-2068 identified the place of use as Palisades Reservoir.

V. Procedural Facts

The Director's reports were filed on December 16, 2006. Numerous objections and responses were filed by various parties. See Subcase Summary Reports for water rights 01-2064 and 01-2068. On January 26, 2012, all parties except the City of Pocatello submitted a stipulation to resolve many of the issues associated with these water rights. However, several issues were not resolved.

On January 25, 2012, the State of Idaho filed its motion for partial summary judgment. In that motion, the State, while asking the Special Master to delete any reference to the *Eagle Decrees* in the partial decrees, admittedly "does not seek interpretation of the Palisades Contracts or determination of whether any provisions of the Palisades Contract should be reflected in the partial decrees." *State Memo* at 10, n.22 (underline in original).

STANDARD OF REVIEW

Summary judgment is appropriate if the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497 (2005). Where the action is to be tried before the court, the judge need not draw inferences in favor of the nonmoving party, but is then free to arrive at the most probable inferences based on the uncontroverted evidence. *Losee v. Idaho Co.*, 148 Idaho 219, 222 (2009). Conflicting evidentiary facts, however, must still be viewed in favor of the non-moving party. *Id.* If there are no material facts in dispute, the court may enter judgment in favor of the party who is entitled to prevail as a matter of law. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310 (Ct. App. 1982).

ARGUMENT

I. The Administrative Provisions Should be Included on the Partial Decrees for Water Rights 01-2064 and 01-2068.

The administrative provisions referenced in the *Eagle Decree* should be included on water rights 1-2064 and 1-2068. Idaho Code requires the use of remarks when they are necessary for the administration of the water rights. I.C. § 42-1411(2)(j) (requiring addition of any remarks that are “necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director”).

The administrative provisions referenced in the *Eagle Decree*, which are also contained in the Palisade Contracts, are necessary for administration of the storage water rights. As detailed in the *SWC Response Brief*, Statement of Facts, Part IV, the provisions were the result of several years of negotiations and agreements by the spaceholders in order to make new storage at Palisades Reservoir possible. The storage operations and resulting administration directly resulted from these provisions. For example, three of these provisions address the physical location of the storage water and its administration. Two address the rights of NSCC, BID and MID to exchange storage water held in Jackson Lake Reservoir with storage water in American Falls Reservoir. The third addresses the use of upstream reservoirs to temporarily store water allocated to downstream reservoirs.

These provisions are derived from the Palisades Contracts and *Eagle Decree*. Ex. 41 (Tr. Vol. II, p. 372, lns. 16-20), *Thompson Aff.* (“Q. But you would still agree that there are provisions from either the contracts or exhibits to this decree that you use in water right administration? A. Yes.”); *Id.* (Tr. Vol. II, p. 295, lns. 19-24) (“Q. To your knowledge is there any basis for these water rights [for winter water savings], other than the Bureau contracts and

the *Eagle Decree*? A. None that I'm aware of"); *Id.* (Tr. Vol. II, p. 316, lns.8-13) (testifying that the contracts and *Eagle Decree* are the sole source of the exchange provisions).

The "Winter Water Savings" provision has been agreed to by all parties except the City of Pocatello, who did not sign the stipulation. *See Stipulation to Resolve Certain Objections* (January 26, 2012). Accordingly, in the event the Special Master does not accept the parties' proposed resolution, the "winter water savings" provision should be referenced in the storage water rights.

As to the "temporary upstream storage" remark, Tony Olenichak explained that it is regular practice today to hold water "in the reservoir system space that is furthest upstream in order to affect the greatest practical concentration of water." Ex. 41 (Tr. Vol. II, p. 207, lns. 5-8), *Thompson Aff.* In other words, water "stored to the accrual of the American Falls storage right could be physically held in Jackson, Palisades, or Island Park or any upstream reservoirs." *Id.* (Tr. Vol. II, p. 201, lns.10-15). This practice allows Reclamation and the Water District to "maximize the amount [of storage water] captured above Milner Dam." *Id.*; *see also id.* (Tr. Vol. II, p. 230, lns.17-21) (the water savings and exchange agreements in the Palisades Contracts allows storage water to be used more efficiently). Recognition of this administration of the water rights is necessary.

Absent a remark on the partial decrees, the Water District would not have any authority to administer storage water in this fashion. Indeed, the place of use element for the water rights list specific reservoirs, not all upstream reservoirs. *See* Ex. 41 (Tr. Vol. II, p. 203, lns.12-16) ("What it allows for is the continued practice of holding water high up in the system, absent this remark, someone can make the argument that the water that is stored to the American Falls right has to physically reside in American Falls Reservoir").

Furthermore, exchanging storage water in Jackson for water in American Falls allows the Upper Valley water users to actually use storage water they could not otherwise divert and results in “a shorter distance” for the delivery of that water to the Lower Valley water users. *See* Ex. 41 (Tr. Vol. II, pp. 306-11), *Thompson Aff.* The exchange provisions were part of the consideration given to ensure construction of Palisades and senior water right holders like BID and NSCC were given a guarantee that the exchanged space in American Falls would have the same benefit as if it were still located in Jackson Lake Reservoir. In addition, the exchange provisions would require adjustments to the storage accounts by the Water District if certain conditions are met. Ex. 41 (Tr. Vol. II, p. 217-19, pp. 303-04) (“Q. Would the Water District have to make changes in its accounting. A. We would probably certainly be involved in the calculation of it”).

The exchange provisions are particularly important to protect against any conveyance loss charges that may occur in administration. Although the Water District does not currently charge conveyance loss on storage deliveries, it did in prior administration, and there have been discussions of potentially charging conveyance loss in the future for storage water deliveries. *See* Ex. 32 (reference to “Transportation loss on this at 12.8%” for Jackson storage), *Thompson Aff.*; Ex. 41 (Tr. Vol. II, p. 307) (Tony Olenichak testifying that he has “heard those rumors” that the Water District “may be,” again, charging conveyance losses to storage some day).⁹

Administering the storage rights, then, “would require the District ... to figure out where MID is receiving its storage from.” Ex. 41 (Tr. Vol. II, p. 309, lns. 8-14), *Thompson Aff.* As Mr. Olenichak testified:

⁹ It is not unreasonable to consider that the Water District may begin charging conveyance loss. Indeed, that was the practice until 1978. Ex. 41 (Tr. Vol. II, p. 306, lns.10-11), *Thompson Aff.* (“In 1978 that process changed where there was no conveyance loss charge for storage conveyance”).

Q. [BY MR. FLETCHER]: ... If those changes were made and conveyance losses are charged again, which they have been in the past, then the District [i.e. Water District 01] would have to figure out a way to account for those conveyance losses?

A. [BR MR. OLENICHAK]: Correct.

Q. *And that would require the District as part of its administration to figure out where MID is receiving its storage from?*

A. *Yes.*

Id. (Tr. Vol. II, p. 309, lns. 2-14) (emphasis added); *see also id.* (Tr. Vol. II, pp. 369-70) (“Q. ... Would you agree that the – knowing the allocation for each canal, knowing the storage entitlement is part of your administration? A. It is part of it, yes.”). Accordingly, it is necessary for these provisions to be included on water rights 01-2064 and 01-2068.

Finally, with respect to the water use and measurement and storage administration related to the Bureau of Indian Affairs’ Michaud Division of the Fort Hall Indian Reservation, Exhibit F of the *Eagle Decree* defines the necessary provisions to be implemented by the Water District. Ex. E, *Arrington Aff.* BIA’s contract with Reclamation requires the following to protect prior water rights to the Snake River, including the American Falls storage water right 01-2064, as a result of impacts from its junior water use:

8. (a) To the extent that water is pumped from wells and from surface streams that flow into American Falls, actual measurements at the well heads and at discharge lines of other pumping plants delivering water for the said Michaud Division shall be made during each irrigation season. All water provided through the Michaud Division system for the irrigation of lands of the Michaud Division of the Fort Hall Indian Reservation from any and all sources in any irrigation season shall be accounted for as water stored for the Indian Bureau as provided in article 4 and charged thereto, except:

(1) Surface waters that may be available under flood water rights that may be obtained with a priority of not earlier than one year before the priority held for Palisades Reservoir; and

- (2) Not to exceed an average annual amount of 22,400 acre-feet, as Prescribed by Section 3(b)(1) of said act of August 31, 1954 (Supra) calculated over a ten-year period including the irrigation season just ended and the preceding nine irrigation seasons, from ground water pumping and place in the Michaud Division system. Until a full ten year period is available, the average shall be for the years of project operation.

* * *

(b) The water chargeable to Indian Bureau stored water as provided in this article shall be determined from day to day during the irrigation season of each year. Corresponding credits from day to day shall be given by the watermaster to the water rights, whether natural flow or storage rights, that have been infringed on by pumping for the Michaud Division. The amounts represented by such infringements, to whomsoever they shall accrue, shall be made up out of stored water available to the Indian Bureau, under this agreement, from day to day, if necessary. The determination of the charges and the credits hereunder shall be under a formula to be devised by the watermaster, after consultation with the Advisory Committee, taking into account as one factor the so called Newell formula with respect to the inflow into American Falls Reservoir, as this formula is affected, in the judgment of the watermaster by operation of this contract and by other factors that affect the Departures from that formula shall be called to the attention of the Advisory Committee from time to time.

Ex. E, *Arrington Aff.*

Inclusion of this provision in the BIA contract, and its administration by the watermaster, was necessary to protect prior water rights. Clifford Fix, an attorney for NSCC, explained the protections provided in the project authorization in a letter to NSCC in 1955:

When the bill came up for consideration last March, however, an amendment was proposed to include the reauthorization of the Michaud Division of the Fort Hall Indian Project for the irrigation of 21,000 acres within the Indian Reservation east of the Michaud Flats project. The water supply for the Indian lands would be derived from stored water in American Falls Reservoir (47,400 acre feet) and Palisades Reservoir (83,900 acre feet) but it was proposed that the water be pumped from the Fort Hall Bottoms, one of the major sources of water supply for downstream natural flow rights from Snake River, to reduce the pump lift. ***This would be on an exchange basis and the amount of water to be pumped would be that which the lands would be entitled to from storage. Your counsel vigorously objected to the authorization of the***

Michaud Division of the Fort Hall project unless there was included in the bill language fully protecting the early natural flow rights of the North Side Canal Company and the Twin Falls Canal Company.

* * *

Your counsel appeared at the hearing before the House Committee on Interior and Insular Affairs at Washington and after extended conferences we were successful in having included in the bill language which in our opinion fully protects for all time the natural flow rights of the North Side Canal Company against any possible claim by the Indians.

Ex. 18 at 2-3 (emphasis added), *Thompson Aff.*; see also 68 Stat. 1026 (Act of August 31, 1954, Section 3 (detailing conditions for development of Fort Hall Indian Reservation, Michaud Division)).

Tony Olenichak, Water District 1 program manager, confirmed that the administration required under the above provisions has been implemented by the watermaster in prior years.

Ex. 41 (Tr. Vol. II, pp. 222-225), *Thompson Aff.* Mr. Olenichak further testified that the required storage adjustments could still be implemented today pursuant to the district's administration.

Id. (Tr. Vol. II, pp. 227, ln. 24 – p. 228, ln. 12). Finally, Mr. Olenichak recognized that the Director's existing remark referencing the Palisades Contracts and *Eagle Decree* could include the above provision relating to the Michaud Division. *Id.* (Tr. Vol. II, p. 228, lns. 13-20).

The Presiding Judge's recent holding that the *Eagle Decree* does not bind non-parties to the elements of the water rights¹⁰ cannot be interpreted to mean that all of the above storage right administrative provisions are not necessary. Indeed, while the State's summary judgment motion seeks to remove reference to the *Eagle Decree*,¹¹ it does not challenge inclusion of these provisions from the Palisades Contracts on the Partial Decrees. *State Memo* at 10, n. 22.

¹⁰ See *Memorandum Decision & order on Challenge*, Subcase Nos. 01-217 *et al.* (Feb. 9, 2011) & *Memorandum Decision & Order on Motion to Alter or Amend Judgment*, Subcase nos. 01-217, *et al.* (May 17, 2011).

¹¹ The SWC addresses these arguments in the *SWC Joint Response Brief*, at Argument, Part II, filed on April 16, 2012.

Nor does the State contend that the provisions are not necessary for the administrative of the rights. As discussed above, the State cannot make such an argument because the undisputed testimony of Mr. Olenichak confirms that administration requires knowledge of the location of the stored water. *Supra*. Furthermore, merely because certain of the parties to these subcases were not also parties to the Palisades Contracts or *Eagle Decree* does not mean that reference to these provisions should be removed from the water rights. Indeed, it is not uncommon for a Partial Decree to include a remark reflecting an agreement between a portion of the parties to the SRBA proceedings. *See SWC Response Brief* at 45.

As is evidenced by the reference to the *Eagle Decree* in the Director's Reports for water rights 01-2064 and 01-2068, the Director agrees that reference to these administrative provisions is necessary pursuant to I.C. § 42-1411. Exs. F & G, *Arrington Aff.* Although IDWR has included a remark generally referencing the spaceholder contracts and the administrative procedures contained in the *Eagle Decree*, the Coalition offers more precise remark for the Special Master's consideration. The remark does not change the substance of IDWR's recommendation, but provides clarity in carrying over the exact administrative provisions that should be included in the partial decrees for storage water rights 01-2064 and 01-2068.

The SWC proposes the following remark, which incorporates the relevant provisions from the Palisades Contracts, with mention of the *Eagle Decree* merely as a point of reference for the remarks:

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

In the alternative, the SWC would propose the following remark, with attachments to the Partial Decrees:

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

Attached to the Partial Decrees, therefore, would be copies of each of the relevant provisions from the Palisades Contracts.¹²

Finally, should the Court decide that neither of these remarks is appropriate to recommend by granting the Coalition's summary judgment motion, the Court should at a minimum keep the remarks originally included in the Director's Report for water rights 01-2064 and 01-2068. These remarks are as follows:

(Under Place of Use): Place of use for irrigation storage and power storage is American Falls Reservoir,¹³ however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range, 21E, sections 28 and 29, when determined by the Department of Water Resources, the Water District advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner Dam.

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

(Under Other Provision Necessary): A portion of this right is designated as the first to fill for the benefit of the contract holders as provided in the provisions for saving winter water as recognized in the Burley Irrigation Dist. v. Eagle, Supplemental Decree (Idaho 5th Jud. Dist., July 10, 1968) and Aberdeen-

¹² A copy of the proposed attachment is included with the Coalition's motion for partial summary judgment, as Exhibit 1

¹³ Water right 01-2068 identified the place of use as Palisades Reservoir.

Springfield Canal Co. v. Eagle, Supplemental Decree (Idaho 7th Jud. Dist., March 12, 1969).¹⁴

Exs. F & G, *Arrington Aff.*

However, the Special Master should only recommend the above remarks with the finding that the relative administration provisions identified in the Palisades Contracts and exhibits to the *Eagle Decree* are necessary for and must be implemented in water right administration.

As discussed in the *SWC Response Brief*, Argument, Part II, the State's demand that the Court remove all references to the *Eagle Decree* is without merit and should be rejected. Indeed, the Director's recommendation confirms that citation to the *Eagle Decree* is an easy and clear way to reference these necessary administrative provisions.

Since they are "necessary ... for administration of the right[s] by the director," I.C. § 42-1411(2)(j), the administrative provisions discussed above should be included on water rights 01-2064 and 01-2068.

II. Parties to the *Eagle Decree* are Bound by its Provisions and Cannot Challenge Them in the SRBA.

Although there are several objections and responses to water rights 01-2064 and 01-2068, several parties to these subcases cannot challenge the inclusion of these remarks on the water rights. It is a basic tenet of Idaho law that a party to a decree is bound thereby. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 741-42 (1997); Judge Melanson's *Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law* at 12 (subcase no. 29-11609) (Oct. 6, 2006).

The undisputed fact is that several parties to these proceedings, in particular, the City of Pocatello and the American Falls Spaceholders, were all parties to *Eagle Decree* proceedings and

¹⁴ This remark is only necessary if the Special Master does not accept or approve the *Stipulation to Resolve Certain Objections* executed by all parties except the City of Pocatello and filed on January 26, 2012.

signed the *Stipulation* that resulted in the *Eagle Decree*. Ex. 21, *Thompson Aff.*. Through that *Stipulation*, the parties agreed to water right elements and administrative provisions that would govern the storage rights. *Id.* These provisions were specifically identified in the *Stipulation*, *id.*, and attached to the *Eagle Decree*, Ex. E at 19, *Stanish Aff.* As such, these entities are bound to accept the provisions in the SRBA.

Principles of *res judicata* prohibit a challenge to these administrative provisions in the SRBA, by parties to the *Eagle Decree* proceedings:

The doctrine of *res judicata* covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel).¹⁵ ...

Five factors are required in order for issue preclusion to bar the relitigation of an issue determined in a prior proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

...

For claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) final judgment.

Ticor Title Co. v. Stanion, 144 Idaho 119, 123-24 (2007).

Both issue preclusion and claim preclusion bar any challenge to the *Eagle Decree* administrative provisions by the City of Pocatello and the American Falls Spaceholders. As to issue preclusion, elements 1, 2, 3 and 4 are met as a result of the *Stipulation* and resulting *Eagle Decree*. Indeed, each of the administrative provisions identified by the SWC were specifically

¹⁵ *Res judicata* serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123-24 (2007)

discussed in the *Stipulation*, Ex. 22 at 24-25, *Thompson Aff.*, and then specifically incorporated into, and attached to, the final *Eagle Decree*, Ex. E at 19-20, *Stanish Aff.* The *Eagle Decree* was a final judgment. Finally, the City of Pocatello and the American Falls Spaceholders identified above were each either signatories to the *Stipulation* or their predecessors were signatories to the *Eagle Decree*.

Since the matter involves the same parties and same issues from the *Eagle Decree*, claim preclusion also bars a subsequent challenge to inclusion of the *Eagle Decree* administrative provisions in the SRBA Partial Decrees by the City of Pocatello and American Falls Spaceholders. *Ticor Title Co.*, *supra*.

Importantly, by signing the *Stipulation*, the City of Pocatello and the American Falls Spaceholders all specifically agreed to the administrative provisions – confirming that these provisions “should be binding upon all persons claiming rights to the use of the waters of [the] Snake River and its tributaries above Milner Dam.” Ex. 22 at 24, *Thompson Aff.* As such, they cannot now object to the provisions before this Court. *See Memorandum Decision* at 13 (subcase no. 29-11609) (parties to prior proceedings cannot “re-adjudicate the right under a more favorable legal theory in a subsequent proceeding”).

The administrative provisions confirmed and ratified by the *Eagle Decree* should be included in the SRBA Partial Decrees. Since the City of Pocatello and American Falls Spaceholders each stipulated to including these remarks on the *Eagle Decree*, they cannot now collaterally attack the *Eagle Decree* in this Court.

III. Subsequent Appropriators are Bound by the *Eagle Decree* Administrative Provisions.

In the *Eagle Decree*, the District Court ratified, confirmed and adjudicated certain administrative provisions that were originally developed through the Palisades Contracts. Ex. E

at 19, *Stanish Aff.* These provisions, which are identified above, were specifically identified and set forth in the *Eagle Decree*. *Id.* In addition, a copy of each provision was attached to the *Eagle Decree*. *Id.* According to the court, the provisions are “binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam.” *Id.*

The district court’s authority to adjudicate these administrative provisions is based in the Constitution. “The district court shall have ***original jurisdiction in all cases***, both at law and in equity, and such appellate jurisdiction as may be conferred by law.” IDAHO CONST. art. V, § 20 (emphasis added); *see also* I.C. § 1-705 (“The district court has original jurisdiction: (1) In all cases and proceedings”). As the Supreme Court confirmed in *Bach v. Miller*:

The district court had both personal jurisdiction over the parties and subject matter jurisdiction over the claims they presented. ... Second, the district court also had subject matter jurisdiction over the claims presented by the parties. Subject matter jurisdiction is the power to determine cases over a general type or class of dispute. ***Article V, § 20 of the Idaho Constitution provides that the district court shall have original jurisdiction to hear all cases, both at law and in equity.*** Thus, the district court had the subject matter jurisdiction to determine the claims presented by the parties.

144 Idaho 142, 145 (2007) (emphasis added).

This law grants to the District Court the authority to preside over “all cases.” This authority is independent of the jurisdiction provided in other statutes. Accordingly, whereas one statute, such as the summary supplemental adjudication statute, I.C. § 42-1405 (1948), may limit the Court’s jurisdiction in a certain area – providing that its adjudication of water rights is binding only on parties to the proceeding – the district court’s general jurisdictional authority does not have such a limitation.

In recent SRBA decisions, Judge Wildman held that decrees issued pursuant to the summary supplemental statute are not binding on third parties. *Memorandum Decision & order on Challenge*, Subcase Nos. 01-217, *et al.* (Feb. 9, 2011); *Memorandum Decision & Order on*

Motion to Alter or Amend Judgment, Subcase Nos. 01-217, *et al.* (May 17, 2011) (collectively, the “Power Rights Decisions”). Those decisions, however, did not address the issue before the Court at this time: Whether the administrative provisions confirmed, ratified and adjudicated through the *Eagle Decree* are binding on the parties to that adjudication and on all junior water users.

The Power Rights Decisions do not justify a holding that the administrative provisions in the *Eagle Decree* are not binding on junior water users who were not a party to those proceedings. Indeed, the Court’s decisions were very clear: the summary supplemental adjudication statute applies to the adjudication of **water rights**. *Decision on Challenge*, at 12 (the statute “provided for the summary supplemental adjudication of **water rights**”) (emphasis added); *id.* at 13 (“the terms of the former statute provide that a decree issued in a summary supplemental adjudication is *not* conclusive as to the nature and extent of any **water rights**”) (emphasis added); *Decision on Motion to Alter or Amend*, at 7 (a “summary supplemental adjudication not only failed to result in a *de facto* general adjudication ... but it also failed to adjudicate any **water rights**”) (emphasis added); *id.* 8 (“the summary supplemental proceedings was not intended as a substitute process for adjudicating a **water right**”) (emphasis added); *id.* (“any decree entered resulting from a summary supplemental adjudication proceeding did not adjudicate **a water right**”) (emphasis added).

A review of the summary supplemental adjudication statute confirms this reading. I.C. § 42-1405 (1948) (“summary supplemental adjudication of **water rights**”) (“Where the priority rights upon any stream ... have been determined by decree ... and thereafter it shall appear that any person or corporation **having the right to the use of any part of said water** ... or that any

person *who subsequent thereto has acquired any right to the use of such water*") (emphasis added).

Since the summary supplemental adjudication statute only provided authority relative to the adjudication of water rights, this Court could not hold that the administrative provisions confirmed, ratified and adjudicated in the *Eagle Decree* have the same limited binding affect as the water rights.

In its summary judgment motion, the State incorrectly argued that the Court's Power Right Decisions foreclosed any attempt to include reference to the *Eagle Decree*. *State Memo* at 10-15. The Coalition responded to this erroneous argument in the *SWC Response Brief*, Argument, Part II. The State's argument is based on one cherry picked sentence from a header on one page of the decision. The state's reliance on that header, which reads "The *Eagle Decree* did not adjudicate any water rights or other administrative provisions," is misplaced. First, as discussed above, the plan language of the summary supplemental adjudication statute, and the Court's Power Rights Decisions, confirmed that the limited binding nature only applied to the adjudication of the water rights. Second, in the section under the quoted header, the Court does not discuss any administrative provisions or explain why those administrative provisions may not be binding.

Finally, the question about the binding nature of the administrative provisions was not before the Court in those proceedings. Rather, the question before the Court was whether or not a provision from the Palisades Contracts should be included on the water rights. The Court held that the provision was a contractual issue – not an administrative issue. *Decision on Challenge* at 18-24. As such, even if the header could be construed as a holding of the Court, it would be pure dicta – and would not be binding. *Smith v. Agnell*, 122 Idaho 25, 35 (1992) (Bistline, J.,

Concurring) (“Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself”) (*quoting* Black’s Law Dict., 6th Ed. 1990). “Such dicta ‘cannot be relied upon as binding precedent.’” *St. Luke’s Magic Valley Reg’l Med. Ctr., Ltd. v. Bd. of County Com’rs of Gooding County*, 149 Idaho 584, 595 (2010).

The district court had jurisdiction to adjudicate administrative provisions that was separate and distinct from the summary supplemental adjudication statutes. Such provisions are binding on the parties to the *Eagle Decree* adjudication and all water users who subsequently appropriated water rights. Indeed, all junior water rights “take the system as they find it.” That juniors are “subject to all prior rights” is firmly entrenched in Idaho law. *Big Wood Canal Company v. S.H. Chapman*, 45 Idaho 380, 402 (1927); *see also* IDAHO CONST. Art XV, § 3; I.C. §§ 42-602, 607; *Clear Springs Foods, Inc. v. Spackman*, 252 P.3d 71, 81 (Idaho 2011) (Idaho’s constitution and water distribution statutes require administration pursuant to the prior appropriation doctrine).

CONCLUSION

The administrative provisions confirmed and ratified by the *Eagle Decree* are necessary for the administration of water rights 01-2064 and 01-2068. As such, they should be included on the partial decrees for the water rights. The SWC proposes the following remark to be included on the water rights:

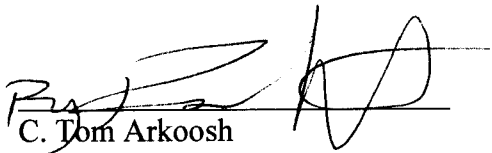
- (1) The delivery of water to this right is subject to the procedures described in the United States Bureau of Reclamation spaceholder contracts, as amended, in connection with the Palisades project and the Minidoka project, which are attached as Exhibits A, B (Provisions 19 and 20), C (Provision 19a),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

or

- (2) The delivery of water to this right is subject to the procedures described in the United States Bureau of Reclamation spaceholder contracts, as amended in connection with the Palisades project and Minidoka project (attached hereto).¹⁶

DATED this 19th day of April, 2012.

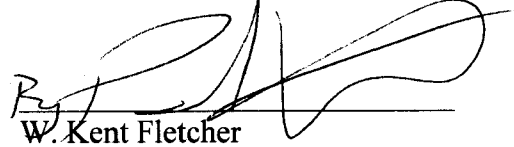
CAPITOL LAW GROUP PLLC



C. Tom Arkoosh

*Attorneys for American Falls
Reservoir District #2*

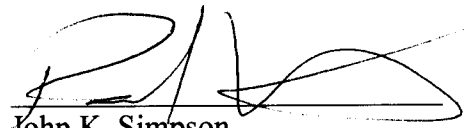
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¹⁶ A proposed copy of the provisions is attached to the Coalition's *Motion for Partial Summary Judgment*.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2012, I served a true and correct copy of the foregoing **COALITION'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** on the person(s) listed below, by U.S. Mail, and electronic mail if available:

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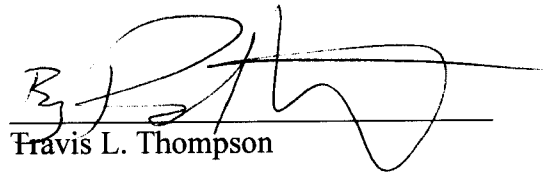
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ATTACHMENT A

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

01-2068
01-2068D
01-2068E
01-2068F
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