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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. See Attachment A
)

) **STATE OF IDAHO'S RESPONSE**
) **TO SURFACE WATER**
) **COALITION'S JOINT MOTION**
) **FOR PARTIAL SUMMARY**
) **JUDGMENT**
)

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INTRODUCTION

The *Surface Water Coalition's Joint Motion For Partial Summary Judgment Motion* ("Motion")¹ puts before this Court, for the fifth time since November 2009, the argument that the *Eagle Decrees* adjudicated a "common plan" for administration of the Snake River consisting of provisions of the Palisades Contracts, that these provisions are binding on all water users, and that they must be incorporated into partial decrees. This Special Master and the Presiding Judge have repeatedly rejected this argument. This Special Master should deny the Coalition's *Motion* for the same reasons set forth in his prior decisions and those of the Presiding Judge, and also because the "administrative provisions" of the Palisades Contracts deal exclusively with the allocation and distribution of stored water, not with the administration of the water rights to divert natural flow into the American Falls and Palisades reservoirs.

The Coalition's latest attempt to have the provisions of the federal storage space contracts decreed in the SRBA as administrative provisions binding on all water users warrants a detailed consideration of the previous SRBA proceedings on these issues. The following factual discussion documents these proceedings in some detail to provide the context necessary to analyze the Coalition's arguments.

FACTS

The Coalition argued to this Court that the *Eagle Decrees* adjudicated a "common plan" of administration on five previous occasions: (1) in opposing summary judgment in

¹ Filed April 19, 2012. The members of the "Surface Water Coalition" are American Falls Reservoir District No. 2, Minidoka Irrigation District, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company. *Motion* at 1. In this memorandum, the "Surface Water Coalition" is usually referred to simply as "the Coalition."

the Minidoka and Palisades power rights subcases²; (2) in moving for designation of a basin-wide issue on the “common plan”³; (3) in moving to alter or amend this Special Master’s summary judgment decision in the Minidoka and Palisades power rights subcases; (4) in challenging this Special Master’s recommendation in the Minidoka and Palisades power rights subcases; and (5) in moving for reconsideration of the Presiding Judge’s denial of the Coalition’s challenge.

I. THE COALITION’S OPPOSITION TO SUMMARY JUDGMENT IN THE MINIDOKA AND PALISADES POWER RIGHTS SUBCASES

The Coalition opposed a hydropower remark proposed by the State and the Bureau in their summary judgment motions before this Special Master in the Minidoka and Palisades power rights subcases, arguing “[t]he Palisades Contracts and the *Eagle Decree* created a ‘common plan for administration of the Snake River’ The *Eagle Decree* court ‘ratified, confirmed, and approved’ the Palisades Contracts and specifically highlighted provisions regarding operations of the reservoirs.” *Surface Water Coalition’s And Idaho Power Company’s Joint Memorandum In Opposition To State Of Idaho’s And United States’ Motions For Summary Judgment* (Nov. 3, 2009), at 19-20; *see also id.* at 74-75 (arguing the *Eagle Decrees* “‘confirmed, ratified and approved’ the ‘common plan for the administration of the operation of the Snake River’ by incorporating certain contract provisions into the decree and making them ‘binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam.’”).

² Subcase Nos. 1-217, 1-218, 1-4024, and 1-4025 (Minidoka Power Rights); 1-2068 and 1-4054 (Palisades Power Rights).

³ Subcase No. 00-91015.

The Coalition repeatedly argued the *Eagle Decrees* “adjudicated” the “common plan of administration” and the “contract provisions,” *id.* at 31, 32, 34, 35, 36, 38, 39, 43, 44, and the *Eagle Decrees* were “a judicial determination” of the “plan for the administration” of water rights in the Upper Snake River basin. *Id.* at 63; *see id.* at 64 (“The *Eagle Decree* constituted a judicial determination for the administration of the rights in the Snake River Basin above Milner Dam.”); *id.* at 78 (“The *Eagle Decree* provided for water rights administration according to contract provisions and a ‘common plan’”). The Coalition further argued:

the *Eagle Decree* proceedings were intended to be, and are, a comprehensive adjudication of every water right above Milner Dam, in essence, a *de jure* and *de facto* general adjudication, that joined as parties all persons diverting water from the Snake River above the Milner Dam. As such, the *Eagle Decree* is fully binding to the same extent as any other decree that has been entered pursuant to a general adjudication.

Id. at 52. The Coalition specifically argued that subsequent appropriators are bound by the *Eagle Decree*: “Junior Water Right Holders Take the River as They Find it and Have No Legal Basis to Challenge the *Eagle Decree*.” *Id.* at 70 (capitalization in original; bold omitted).

The Coalition opposed the proposed hydropower remark jointly on the ground that “key provisions” of the “common plan” controlled hydropower operations. *See id.* at 36 (“With respect to the winter power operation at the Minidoka powerplant, the key provision included as part of the common plan adjudicated in the *Eagle Decree* is Exhibit E, Paragraph 24(a) of the Decree”) ; *id.* at 44 (arguing that the exercise of hydropower water rights was “expressly directed in Reclamation’s contracts, which in turn are adjudicated as a key component of the ‘common plan of administration’ adjudicated in the *Eagle Decree*.”). The Coalition cited “[t]he inconsistencies between the proposed

remark and the contract provisions,” *id.* at 30, and argued the proposed remark was precluded because it “will not adopt the ‘common plan of administration’ adjudicated in the *Eagle Decree*.” *Id.* at 34; *see also id.* at 31 (“The State and Reclamation propose remarks that rewrite and supersede the common plan of administration adjudicated in the *Eagle Decree*.”). The Coalition thus argued for “a general incorporation of the contract provisions adjudicated in the *Eagle Decree*.” *Id.* at 39; *see also id.* at 32 (arguing for “inclusion of a reference to the entire common plan adjudicated in the Eagle Decree”) (bold omitted).

II. THE COALITION’S MOTION FOR DESIGNATION OF A BASIN-WIDE ISSUE ON THE “COMMON PLAN”

The Coalition simultaneously proposed designation of a basin-wide issue on the “common plan”: “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?” *Joint Motion To Designate Basin-Wide Issue* (Oct. 2, 2009) (italics omitted), at 2.⁵ The Coalition based its motion on the “common plan” passages of the *Eagle Decrees* and the “standard contract provisions” of the Palisades Contracts:

This “common plan for the administration of the operation of the Snake River” was “confirmed, ratified and approved” in the supplemental *Eagle* decrees, and the standard contract provisions were incorporated into the *Eagle* Decrees as “binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam.”

Id. at 6 (underlining added). The Coalition’s opening brief argued the “common plan” was “an administrative scheme that affects all federal facilities in the basin and all water rights associated with those facilities.” *Id.* at 5; *see also id.* at 9 (“the common plan

⁵ Subcase No. 00-91015.

applies to all water rights which are satisfied from or affected by operation of these federal facilities”). Further, the Coalition asserted the “common plan” applied to “every water right in the basin,” *id.* at 10, and should be “incorporated into all decrees in Basin 01.” *Id.* at 6.

The Coalition’s reply brief also characterized the “‘common plan for the administration of the Snake River’ adopted by the *Eagle* Decrees” as “constitut[ing] a binding administrative provision decreed by the court,” *Surface Water Coalition’s Reply On Joint Motion To Designate Basin-Wide Issue* (Jan. 14, 2010), at 5. “This judicial confirmation of the ‘common plan’ created an administrative structure that is binding on all water users on the river.” *Id.* at 11. The Coalition also specifically argued “[t]he effect of the inclusion of provisions of the contracts into the *Eagle* Decrees was to bind the parties to those decrees and all subsequent appropriators who came onto the River thereafter to the ‘common plan’ described therein.” *Id.* at 9; *see also id.* at 4 (arguing the “[common plan] affects rights licensed or decreed at the time of the *Eagle* Decree, as well as junior rights which were established later and were taken subject to prior decrees”).

The Coalition attempted to distinguish its basin-wide issue motion from its opposition to the summary judgment motions then pending before this Special Master on the ground “[t]hose proceedings involve hydropower water rights claimed by the United States at two facilities, Minidoka Dam and Palisades Dam.” *Id.* at 7. The Presiding Judge rejected this argument, holding that “substantially the same underlying issues argued in support of this *Motion* were also raised and extensively briefed in the proceedings before the Special Master.” *Order Denying Motion To Designate Basin-Wide Issue* (Mar. 1, 2009), at 9. The Presiding Judge determined:

The “common plan” alleged in this Motion stems entirely from express provisions included in the Palisades Contracts that were subsequently incorporated by reference into the Eagle Decrees. There is no allegation that the “common plan” relies on some other factual or legal basis. Therefore, what is at issue is the significance and application of the express provisions of Eagle Decrees in the SRBA. . . . 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.

Id. at 9-10 (underlining added). The Presiding Judge also considered proposing an alternative formulation of the basin-wide issue: “To what extent if any should provisions of the reclamation contracts be memorialized in partial decrees or a general provision for basin 01?” *Id.* at 11. Even under this formulation, however, the Presiding Judge determined “the Court would nonetheless stay the proceedings to allow the issues regarding the scope and application of the *Eagle Decrees* already pending before the Special Master to be decided.” *Id.*

III. THIS SPECIAL MASTER’S SUMMARY JUDGMENT DECISION

This Special Master granted the State’s and Bureau’s summary judgment motions on the proposed hydropower remark. *Order Granting Motions For Summary Judgment and Special Master Report And Recommendation* (Mar. 25, 2010). In so ruling, this Special Master considered the Coalition’s arguments that the *Eagle Decrees* were essentially “‘a *de jure* and *de facto* general adjudication” and “‘fully binding to the same extent as any other decree that has been entered pursuant to a general adjudication.” *Id.* at 7 (quoting Coalition’s brief), as well as the Coalition’s contention “the Court [should] simply incorporate the *Eagle Decrees* because the proposed remarks fail to reflect the common plan established in the *Eagle Decrees*.” *Id.* at 11 (underlining in original).

This Special Master determined “[t]he Coalition’s suggestion that the BOR’s water rights should incorporate the *Eagle Decrees* is attractive in its simplicity, but misleading in its premise and scope.” *Id.* at 11.

there is no evidence that either judge intended to “freeze” the Contracts in place as decreed elements of the water rights or their administration, in no small part because the Contracts contain multiple provisions that go well beyond the elements of Idaho water rights and would insinuate the IDWR Director into contract matters well outside his purview. By ratifying, confirming and approving the Contracts, the judges did not mandate a “common plan” that would bind all parties, the State and the United States in how Snake River is administered. The judges were merely describing a comprehensive plan of operation developed as part of the Palisades project, nothing more.

Id. 11-12 (underlining added). This Special Master also relied on “a distinction both judges must have recognized: ‘Water right decrees and contracts serve different purposes.’” *Id.* at 12 (quoting State’s brief).

A water right decree describes the nature and extent of the owner’s right to the use of water from a particular water system, whereas a contract memorializes an agreed-upon exchange of promises and consideration between two or more parties. . . . By their very nature, the Palisades Contracts may be amended from time to time as conditions change, all without court intervention such a [contractual hydropower] provision is a contract right, not an element of a water right. Any claim of non-compliance under the Contracts is a matter for the Court of Federal Claims.

Id. at 12 (underlining added).

IV. THE COALITION’S MOTION TO ALTER OR AMEND THIS SPECIAL MASTER’S SUMMARY JUDGMENT DECISION.

The Coalition moved to alter or amend this Special Master’s order and recommendation, asserting “the issue before the Special Master in these subcases is the force and effect that should be given to . . . the *Eagle Decree*,” and arguing “the *Order* overlooked the ‘common plan of administration’ established by the Palisades Contracts

and incorporated into the *Eagle Decree*.” *Surface Water Coalition’s Joint Motion To Alter Or Amend* (Apr. 28, 2010), at 2. The Coalition asserted this Special Master’s decision threatened “one vital element of the common plan - the power loss payment program,” because the joint remark supported by the State and the Bureau differed from the power loss provisions of the Palisades Contracts and *Eagle Decrees*. *Id.* at 3; *see id.* at 8 (arguing the winter water savings and power loss provisions of the *Eagle Decrees* were “vital part[s] of the ‘common plan’”).

The Coalition also renewed its assertions that the “common plan” for administration “is set forth in the Palisades Contracts, signed by the Bureau, and subsequently ‘ratified, confirmed and approved’ by the *Eagle Decree*.” *Id.* at 9; *see also Reply In Support Of Surface Water Coalition’s Joint Motion To Alter Or Amend* (Jun. 22, 2010), at 4 (“The Palisades Contracts, as ‘ratified, confirmed and approved’ by the *Eagle Decree*, established a ‘common plan’ for the administration of water rights along the Snake River.”).

This Special Master determined “it is apparent that the issues [the Coalition] raises now were argued before and addressed” in his original summary judgment order and recommendation to the Presiding Judge. *Order Denying Joint Motion To Alter Or Amend* (Jul. 29, 2010), at 5. This Special Master reiterated the holdings he had “explicitly or implicitly” made in the original order, *id.*, including:

1. Judge Ward, and later Judge Burton, did not mandate a “common plan” for administration of the Snake River and its tributaries above Milner Dam - they merely “ratified, confirmed and approved” the 1950s Palisades Contracts. . . .

6. The *Foster Decree* and *Eagle Decrees* were not *de jure* and *de facto* general adjudications.

7. The State and the United States are not bound by the *Eagle Decrees*.

8. Water right decrees and contracts are not the same. A water right describes the nature and extent of the owner's right to use water while a contract memorializes an agreed-upon exchange of promises and consideration between two or more parties. The remarks proposed by the State and the United States amend contracts, not elements of water rights. .

12. The Palisades Contracts may be amended from time to time as conditions change, all without court intervention.

Id. at 5-6.

V. THE COALITION'S CHALLENGE TO THIS SPECIAL MASTER'S SUMMARY JUDGMENT DECISION.

The Coalition challenged this Special Master's orders and recommendation before the Presiding Judge, asserting the *Eagle Decrees* "referred to the reservoir operations and plan established by the contracts, *Foster Decree* and *Eagle Decree* as a 'common plan of administration' for the Snake River Basin," and "[t]he portion of the 'common plan of administration' involved in these proceedings is the operation of the hydropower water rights at Minidoka and Palisades Dams, including the power loss payment program set forth in the contracts and the *Eagle Decree*." *Notice Of Challenge* (Aug. 12, 2010), at 3. The Coalition's challenge identified several issues, specifically including "[w]hether the Special Master's *Recommendation* violates the 'common plan of administration' set forth in the *Eagle Decree*?" *Id.* at 6; see also *Surface Water Coalition's Joint Opening Brief On Challenge* (Oct. 7, 2010), at 4 (same).

In its opening brief on challenge, the Coalition again argued that the *Eagle Decrees* were a binding adjudication of the "common plan of administration":

Special Master Dolan wrongly concluded that "the judges did not mandate a 'common plan' that would bind all parties . . . in how Snake River is administered." . . . To the contrary, the *Eagle Decree* did adjudicate a "common plan" of administration which included the specific subordination of the power water rights at Minidoka in exchange for

'power loss' payments by those who benefitted from increased irrigation storage.

Id. at 22-23 (underlining in original); *see id.* at 34 (referring to the “‘common plan’ of administration adjudicated in the *Eagle Decree*”); *id.* at 35 (same); *id.* at 38 (same); *id.* at 40 (same); *id.* at 48 (same); *see id.* at 66 (“the *Eagle Decree* was a judicial determination of . . . a plan for the administration of said rights”); *id.* at 67 (“the *Eagle Decree* constitutes a judicial determination for the administration of the water rights therein”). The Coalition argued the *Eagle Decrees* constituted a *de jure* and *de facto* general adjudication binding on all water users, regardless of whether they had been parties to the Palisades Contracts or the *Eagle Decrees*:

the *Eagle Decree* proceedings were intended to be, and are, a comprehensive adjudication of every water right above Milner Dam, in essence, a *de jure* and *de facto* general adjudication, that joined as parties all persons diverting water from the Snake River above the Milner Dam. As such, the *Eagle Decree* is fully binding to the same extent as any other decree that has been entered pursuant to a general adjudication. . . .

As discussed above, although the parties to the *Eagle Decree* initiated the adjudication through the summary supplemental adjudication statute, the *Eagle Decree* was intended to be a complete adjudication of the waters of the Snake River Basin above Milner Dam Therefore, the *Eagle Decree* was a general adjudication and binding on parties and nonparties alike. . . .

Since, as discussed above, the *Eagle Decree* was a judicial determination of all the water rights in the Snake River above Milner Dam and a plan for the administration of said rights, it is a *de facto* general adjudication.

Id. at 55, 62, 66.

The Coalition also asserted the Palisades Contracts were “adjudicated as a key component of the ‘common plan of administration’ adjudicated in the *Eagle Decree*,” *id.* at 48, particularly certain contract provisions, examples of which had been to the *Eagle Decrees* as exhibits. *See id.* at 39 (referring to “every contract provision adjudicated in

the *Eagle Decree*”); *id.* at 38 (The *Eagle Decree* . . . specifically highlighted provisions [of the Palisades Contracts] regarding operations of the reservoirs”); *id.* at 40 (referring to “selected contract provisions adjudicated in the *Eagle Decree*”); *id.* at 44 (referring to “the contract provisions adjudicated in the *Eagle Decree*”); *id.* at 46 (referring to “contractual obligations adjudicated in the *Eagle Decree*”).

The Coalition further argued “[t]he *Eagle Decree* was litigated and entered in large part to confirm by decree various provisions of these Palisades Contracts,” *id.* at 71, and the *Eagle Decree* “‘confirmed, ratified and approved’ the ‘common plan for the administration of the operation of the Snake River’ by incorporating certain contract provisions into the decree and making them ‘binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam.’” *Id.* at 77 (underlining added). The Coalition asserted the power loss payment program of the Palisades Contracts was “[c]ritical to the ‘common plan,’” *id.* at 8, and the contracts’ winter power operations sections were a “key provision . . . of the common plan adjudicated in the *Eagle Decree*.” *Id.* at 40.

The Coalition also argued the SRBA must “carry forward the binding provisions of the *Eagle Decree*,” *id.* at 37, and “[t]his can be accomplished through a general incorporation of the contract provisions adjudicated in the *Eagle Decree*.” *Id.* at 44. The Coalition also asserted: “Any Provision Included on Reclamation’s Water Rights Should Recognize and Affirm the Rights Are Subject to the Provisions of the *Eagle Decree*.” *Id.* at 83 (capitalization in original; bold omitted).

The Coalition’s reply brief on challenge again asserted the *Eagle Decrees* were intended “to ensure the [Palisades] contracts were ratified and adopted for purposes of

administration of water rights in the Upper Snake River Basin,” *Surface Water Coalition’s Rebuttal Brief On Challenge* (Nov. 12, 2010), at 1, and stated “the true issue” presented by the Coalition’s challenge was “recognizing the prior contracts and decrees.” *Id.* at 10. The Coalition argued the *Eagle Decrees* “incorporated several provisions at the demand of Reclamation.” *Id.* at 3; *see id.* at 11 (“The final Eagle Decree included provisions specifically demanded by Reclamation”); *id.* at 12 (“The process leading up the *Eagle Decree* included Reclamation’s participation and demand that certain provisions be contained in the final decree.”).

The Coalition also again argued that the power loss provisions of the Palisades Contracts were integral parts of the *Eagle Decrees*’ “common plan.” *See id.* at 12 (“Reclamation specifically created a common plan for administration of water rights along the Snake River - including the power loss payment program.”); *see id.* at 13 (“the Palisades Contracts were confirmed, in total, in the *Eagle Decree*. As such, the power loss provisions of the Palisades Contracts are part and parcel of the exercise of the water rights”).

The Coalition also asserted the “provisions” of the *Eagle Decrees* must be included in the partial decrees. *See id.* at 13 (“the *Eagle Decree* confirmed the common plan for the administration of water rights in the upper Snake River basin and confirmed the Palisades Contracts. . . . Its provisions, therefore, are relevant and ‘necessary’ for the administration of the water rights.”). The Coalition also argued the “power loss provisions of the Palisades Contracts” should specifically be referenced in the partial decrees.” *See id.* (“The Partial Decrees Should Reference the Power Loss Provisions of the Palisades Contract”).

VI. THE PRESIDING JUDGE'S DENIAL OF THE COALITION'S CHALLENGE

The Presiding Judge denied the Coalition's challenge and affirmed this Special Master's conclusions. *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 29-30. The Presiding Judge determined the Coalition's challenge was based on provisions of the Palisades Contracts that were incorporated into the *Eagle Decrees*:

The [*Eagle*] *Decree* incorporated by reference and "ratified, confirmed and approved" certain provisions of the Palisades Contracts. The provisions incorporated into the *Eagle Decree* pertained to, among other things, the three water savings mechanisms identified in the Palisades Contracts: (1) the elimination of winter diversions; (2) the curtailment of use of water for power generation at Minidoka Dam; and (3) the coordinated operation of the reservoir system for maximum storage.

Id. at 10-11. The Presiding Judge also determined the Coalition was asserting the *Eagle Decrees* constituted a general adjudication binding on all water users, regardless of whether they were parties to the Palisades Contracts or the *Eagle Decrees*. *See id.* at 11 ("the SWC argues the *Eagle Decree* is, in essence, a *de jure* and *de facto* general adjudication that is binding upon the USBOR and the State"); *see also id.* at 12-13 ("The SWC argues that even though the *Eagle Decree* resulted from a summary supplemental adjudication proceeding, it is a *de jure* and/or *de facto* general adjudication decree that is binding on parties and non-parties alike").

The Presiding Judge held "this Court disagrees" and the Coalition's argument "is untenable." *Id.* at 11, 13. The Presiding Judge determined "it is undisputed that the *Eagle Decree* Adjudication was commenced pursuant to former Idaho Code § 42-1405

(1948),” *id.* at 12 (footnote omitted),⁶ and therefore the *Eagle Decrees* were not binding on non-parties:

The differences between a general adjudication decree and a summary supplemental adjudication decree issued pursuant to the former statute are stark. Most significantly, it is clear that I.C. § 42-1405 (1948) did not contemplate that such a decree would have the same *res judicata* or binding effect as a general adjudication decree. . . . Since the *Eagle Decree* does not carry the binding or *res judicata* effect of a general adjudication decree it cannot bind non-parties to its terms.

Id. at 13 (underlining added). The Presiding Judge further held that the “publication only” method of notice authorized by the summary supplemental adjudication statute (and actually relied upon in the *Eagle Decree* litigation⁷) confirmed that the *Eagle Decrees* could not bind non-parties. *Id.* at 17. The Presiding Judge explained that while publication-only notice might be sufficient for strictly *in rem* proceedings, “in a *quasi in rem* proceeding, such as a water rights adjudication . . . persons claiming an interest in the property . . . must be served with more than constructive notice via publication.” *Id.* at 17. The Presiding Judge relied on Idaho Supreme Court precedent holding that water right adjudication statutes authorizing publication-only notice are unconstitutional. *Id.* at 17-18 (discussing *Bear Lake County v. Budge*, 9 Idaho 703, 75 P. 614 (1904)).

Having “already disposed of the argument that the USBOR is bound by the terms of the *Eagle Decree*,” the Presiding Judge determined “the only remaining question is whether the Palisades Contracts” precluded a hydropower remark that differed from the language of the Palisades Contracts. *Id.* at 21. The Presiding Judge determined “[t]he SWC argues that the above-mentioned provisions of the Palisades Contracts” had such

⁶ The Presiding Judge also noted “District Judge Theron W. Ward made the finding that the [*Eagle Decree*] adjudication was commenced pursuant to Idaho Code §42-1405.” *Id.* at 12 n.7.

⁷ See, e.g., *Surface Water Coalition’s Joint Opening Brief On Challenge* (Oct. 7, 2010), at 16 n.5, 63, 64, 67) (stating that notice of the litigation was published in newspapers).

preclusive effect. *Id.* at 23. The Presiding Judge rejected this argument and affirmed this Special Master's analysis:

The Special Master correctly identified in his *Order* that a difference exists between pure contractual rights and interests in a water right under state water law. *Order Granting*, p. 12. Any issue pertaining to whether the USBOR's decision to voluntarily subordinate its rights results in a breach of the Palisades Contracts, or in a monetary claim in favor of the SWC, is not ripe for jurisdiction before this Court and does not create a state law interest in the USBOR's water rights in favor of the SWC. Any such issue or claim lies in the jurisdiction of the United States Court of Federal Claims. 28 U.S.C. § 1491(a)(1).

Id. at 24 (underlining added).

VII. THE COALITION'S MOTION TO RECONSIDER THE PRESIDING JUDGE'S DENIAL OF THE COALITION'S CHALLENGE

The Coalition moved for reconsideration of the Presiding Judge's decision. *SWC's Joint Motion For Reconsideration* (Feb. 22, 2012).⁸ The Coalition sought reconsideration of, among other holdings: "the holding that the State of Idaho is not bound by the *Eagle Decree*"; various holdings "which amount to the ruling that the BOR can voluntarily subordinate its water rights regardless of whether or not such subordination would be a unilateral amendment of, or effectively a breach of, the Palisades contracts"; and whether the hydropower remark supported by the State and the Bureau "violate[d] the provisions of the contracts Reclamation entered into with SWC." *Memorandum In Support Of SWC's Joint Motion For Reconsideration* (Mar. 8, 2011), 3-4.

The Coalition argued that the State was bound by the *Eagle Decrees* because the watermaster (Henry Eagle) had been a party to the litigation. *Id.* at 7-11. The Coalition also argued the Bureau should be estopped from taking a position in the SRBA that is

⁸ The Coalition filed the *SWC's Joint Motion For Reconsideration* on February 22, 2012. It subsequently filed an amended motion which, among other things, enumerated the issues upon which the Coalition sought reconsideration. *SWC's Amended Joint Motion For Reconsideration* (Mar. 8, 2011).

contrary to or inconsistent with the terms of the Palisades Contracts. *Id.* at 12-13. The Coalition further argued there were genuine issues of material fact on the question of whether the hydropower remark would result in a breach of the Palisades Contracts, *id.* at 13-14, and that “the Court cannot ignore the conflict created by the new subordination remark and the subordination BOR agreed to in the Palisades Contracts, and approve BOR’s contrary position as a matter of law.” *Id.* at 14.

The Presiding Judge interpreted the Coalition’s motion for reconsideration as a motion to alter or amend pursuant to I.R.C.P. 59(e), and denied it. *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011). The Presiding Judge held the State “is not ‘bound’ by the terms of the *Eagle Decrees* for purposes of the SRBA proceedings,” *id.* at 3 (bold omitted), and even the watermaster had been bound only in “the limited capacity as the instrumentality responsible for administering the water rights within a water district according to priority.” *Id.* at 4. The Presiding Judge explained that the limited “legal effect of the summary supplemental adjudication” was intended only

to recognize prospectively the unadjudicated water right for purposes of delivery and administration until such time as the right is contested, if ever, by an aggrieved water user. 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.

Id. at 4. The Presiding Judge held that, as a summary supplemental adjudication, “the *Eagle Decree* did not adjudicate any water rights or other administrative provisions.” *Id.* at 5 (bold omitted); *see also id.* at 7 (“The summary supplemental adjudication proceeding 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.”) (underlining in original). “[T]he summary supplemental proceeding was not

intended as a substitute process for adjudicating a water right nor could it have been given the limited procedural due process notice requirements for commencing such an action.” *Id.* at 8 (footnote omitted).

Rather, the Presiding Judge explained, a summary supplemental adjudication is simply a means whereby a water user, “short of undertaking the onerous task of initiating a water adjudication or quiet title action and joining as parties all other water users on the source, could have his or her unadjudicated water right recognized and distributed by the watermaster.” *Id.* at 8. The Presiding Judge determined the “limited purpose” of a summary supplemental adjudication was to allow an unadjudicated water right to be distributed by the watermaster under its claimed priority, “as opposed to distributing the [unadjudicated] right junior to all previously adjudicated rights as would otherwise be required.” *Id.* at 11. Thus, the “only ‘binding’ effect on the watermaster, IDWR or the State” was “to recognize and deliver water in accordance with the *prima facie* showing of the unadjudicated right on an interim basis until such time as the water right is either contested or adjudicated in a subsequent proceeding.” *Id.* at 11. “Clearly, had the statute intended any binding effect broader in scope and legal effect concerning the State of Idaho it would have required the action be brought against the State in its sovereign capacity.” *Id.* The Presiding Judge concluded: “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 12.

The Presiding Judge also rejected the Coalition’s arguments that the hydropower remark supported by the State and the Bureau was contrary to the Palisades Contracts and could result in the breach of those contracts. The Presiding Judge cited “the difference

between rights that are purely contractual in nature and interests in water rights pursuant to state law” as discussed in the portion of the *Order On Challenge* affirming this Special Master’s recognition of the same distinction. *Id.* at 12. The Presiding Judge further explained that the Coalition’s desire to incorporate the provisions of the Palisades Contracts and *Eagle Decrees* into the water rights would inappropriately inject the watermaster and IDWR into private contractual disputes:

Finally, it 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 disputes as part of their administrative duties. . . . The watermaster and IDWR are not responsible for getting in the middle of private contract disputes. The contract dispute needs to be resolved in the appropriate forum.

Id. at 14.

VIII. THE PENDING SUMMARY JUDGMENT MOTIONS PERTAINING TO THE PALISADES CONTRACTS AND THE *EAGLE DECREES*

The State filed a motion for partial summary judgment on January 25, 2012, seeking three rulings, including an order that “[t]he partial decrees for storage water rights nos. 01-2064 (American Falls Reservoir) and 01-2068 (Palisades Reservoir) should not include any reference to [the *Eagle Decrees*].”⁹ The Coalition’s *Motion* seeks a remark in the partial decrees providing “[t]he 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

⁹ The full text of the second count of the State’s motion sought a ruling as follows:

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.

State Of Idaho’s Motion For Partial Summary Judgment (Jan. 25, 2012), at 2.

Project,” and incorporating by express reference the exhibits to the *Eagle Decrees*, or, in the alternative, incorporating by reference attachments to the partial decrees reciting provisions of the Palisades Contracts. *Motion* at 2.

ARGUMENT

I. 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 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). Disputed facts are construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Trotter v. Bank of New York Mellon*, 152 Idaho 842, 275 P.3d 857 (2012). If there are no disputed issues of material fact, only a question of law remains. *Id.* The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and each party’s motion must be evaluated on its own merits. *Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 804, 264 P.3d 907, 911 (2011). Parties that file cross-motions for summary judgment relying on the same facts, issues and theories effectively stipulate that there is no genuine issue of material fact that would preclude summary judgment, but the mere fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. *McFadden v. Sein*, 139 Idaho 921, 923, 88 P.3d 740, 742 (2004).

II. THE COALITION’S *MOTION* IS FORECLOSED BY THE PREVIOUS DECISIONS THIS SPECIAL MASTER AND THE PRESIDING JUDGE REJECTING THE COALITION’S “COMMON PLAN” ARGUMENTS.

A. The Coalition’s *Motion* Argues The *Eagle Decrees* Adjudicated A “Common Plan” Of Administrative Provisions That Binds All Water Users And

Therefore Must Be Incorporated Into The Water Rights For American Falls And Palisades Reservoirs.

The Coalition's *Motion* is based on the "common plan" passage of the *Eagle Decrees*:

In addition to adjudicating various water rights,^[10] 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."

SWC Opening Brief at 3 (quoting *Affidavit of David Stanish*, Exhibit E at 19) (Aug. 18, 2009) (underlining added). The Coalition once again argues that through this passage the *Eagle Decrees* conclusively adjudicated an administrative plan consisting of provisions of the Palisades Contracts. *See id.* at 24 ("In the *Eagle Decree*, the District Court ratified, confirmed and adjudicated certain administrative provisions that were originally developed through the Palisades Contracts"); *id.* at 4 ("the *Eagle Decree* specifically identifies several of the necessary administrative provisions from those contracts"); *id.* at 7 ("The *Eagle Decree* ratified and confirmed several administrative provisions that were included in the Palisades Contracts the *Eagle Decree* 'confirmed and ratified' several provisions that would govern administration of the upper Snake River reservoir system") (capitalization and bold omitted); *id.* at 9 ("Through . . . the Palisades Contract provisions the following administrative procedures were established"); *id.* at 13 ("These provisions are derived from the Palisades Contracts and *Eagle Decree*"); *id.* at 23 ("The

¹⁰ While the *Eagle Decrees* recognized certain *prima facie* rights to the delivery of what is often termed "high flows" or "flood waters," they did not "adjudicate" any water rights. *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 7.

Eagle Decree was a final judgment”); *id.* at 24 (arguing the district court had authority “to adjudicate these administrative provisions”).

The Coalition argues that because the *Eagle Decrees* “adjudicated certain administrative provisions that were originally developed through the Palisades Contracts,” the “administrative 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.* at 23-24 (underlining added). The Coalition specifically argues the *Eagle Decrees* made the “administrative provisions” binding on non-parties, including “all water users who subsequently appropriated water rights.” *Id.* at 27 (underlining in original); *see also id.* at 24 (“Subsequent Appropriators are Bound by the *Eagle Decree* Administrative Provisions”) (capitalization in original; bold omitted).

Thus, the Coalition seeks to have “[t]he administrative provisions confirmed and ratified by the *Eagle Decree* . . . included in the SRBA partial decrees” for water right nos. 01-2064 (American Falls Reservoir) and 01-2068 (Palisades Reservoir). *Id.* at 23 (underlining added); *see also id.* at 13 (“The administrative provisions referenced in the *Eagle Decree*, which are also contained in the Palisades Contracts, are necessary for administration of the storage water rights.”); *id.* at 27 (“The administrative provisions confirmed and ratified by the *Eagle Decree* should be included on the partial decrees for the water rights.”).

B. The Coalition’s Current Arguments Were Raised Previously Before This Special Master And The Presiding Judge.

The Coalition’s current arguments are indistinguishable from those it has repeatedly and unsuccessfully made to this Special Master and/or the Presiding Judge in connection with five different motions filed over the past three years in the Minidoka and

Palisades power rights subcases¹¹ and in connection with the Coalition's motion for designation of a basin-wide issue on the "common plan" of the *Eagle Decrees*.¹² In those proceedings, the Coalition repeatedly argued:

- that the *Eagle Decrees* "adjudicated" a "common plan of administration," see, e.g., *Surface Water Coalition's And Idaho Power Company's Joint Memorandum In Opposition To State Of Idaho's And United States' Motions For Summary Judgment* (Nov. 3, 2009), at 44 (referring to "the 'common plan of administration' adjudicated in the *Eagle Decree*");
- that the "common plan" consists of certain "provisions" of the Palisades Contracts, see, e.g., *Surface Water Coalition's Joint Opening Brief On Challenge* (Oct. 7, 2010), at 77 ("the *Eagle Decree* 'confirmed, ratified and approved' the 'common plan for the administration of the operation of the Snake River' by incorporating certain contract provisions"); *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 13 (
- that the *Eagle Decrees* are binding on all water users, see, e.g., *Surface Water Coalition's Reply On Joint Motion To Designate Basin-Wide Issue* (Jan. 14, 2010), at 11 ("This judicial confirmation of the 'common plan' created an administrative structure that is binding on all water users on the river");
- that junior water rights holders and subsequent appropriators are also bound by the *Eagle Decrees*, see, e.g., *id.* at 9 ("The effect of the inclusion of provisions of the contracts into the *Eagle Decrees* was to bind the parties to those decrees and all subsequent appropriators");
- and that the "common plan" provisions must be included or referenced into the partial decrees. See, e.g., *Surface Water Coalition's Joint Opening Brief On Challenge* (Oct. 7, 2010), at 37 (asserting the SRBA must "carry forward the binding provisions of the *Eagle Decree*"); *id.* at 83 ("Any provision included on Reclamation's water rights should recognize and affirm the rights are subject to the provisions of the *Eagle Decree*") (capitalization and bold omitted).

¹¹ Subcase Nos. 1-217, 1-218, 1-4024, and 1-4025 (Minidoka Power Rights); 1-2068 and 1-4054 (Palisades Power Rights).

¹² Subcase No. 00-91015.

See supra, “FACTS.”¹³

C. This Special Master And The Presiding Judge Have Determined The *Eagle Decrees* Did Not Adjudicate A “Common Plan” Of Administration That Binds All Water Users And The Administrative Provisions Of The Palisades Contracts Should Not Be Incorporated Into Partial Decrees.

In rejecting the “common plan” arguments the Coalition repeatedly made in the Minidoka and Palisades power rights subcases and in seeking designation of a basin-wide issue, this Special Master and the Presiding Judge conclusively determined:

- that the *Eagle Decrees* did not adjudicate a “common plan” of administration that binds all water users, *see, e.g., Order Granting Motions For Summary Judgment and Special Master Report And Recommendation* (Mar. 25, 2010), at 12 (“the judges did not mandate a “common plan” that would bind all parties, the State and the United States in how Snake River is administered”); *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 13 (“Since the *Eagle Decree* does not carry the binding or *res judicata* effect of a general adjudication decree it cannot bind non-parties to its terms”); *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 5 (“the *Eagle Decree* did not adjudicate any water rights or other administrative provisions”); and
- that the administrative provisions of the “common plan” are simply private contractual provisions taken from the Palisades Contracts, and as such should not be incorporated into partial decrees. *See, e.g., Order Granting Motions For Summary Judgment and Special Master Report And Recommendation* (Mar. 25, 2010), at 12 (“Water right decrees and contracts serve different purposes. . . . such a [contractual] provision is a contract right, not an element of a water right”)

¹³ *See, e.g., Surface Water Coalition’s And Idaho Power Company’s Joint Memorandum In Opposition To State Of Idaho’s And United States’ Motions For Summary Judgment* (Nov. 3, 2009), at 19-20, 30-32, 24-26, 38-39, 43-44, 52, 63, 70, 74-75, 78; *Joint Motion To Designate Basin-Wide Issue* (Oct. 2, 2009), at 2, 5-6, 9-10; *Surface Water Coalition’s Reply On Joint Motion To Designate Basin-Wide Issue* (Jan. 14, 2010), at 4-5, 9, 11; *Surface Water Coalition’s Joint Motion To Alter Or Amend* (Apr. 28, 2010), at 2-3, 8-9; *Reply In Support Of Surface Water Coalition’s Joint Motion To Alter Or Amend* (Jun. 22, 2010), at 4; *Notice Of Challenge* (Aug. 12, 2010), at 3, 6; *Surface Water Coalition’s Joint Opening Brief On Challenge* (Oct. 7, 2010), at 4, 8, 22-23, 34-35, 38-40, 44, 46, 48, 55, 62, 66-67, 71, 77, 83; *Surface Water Coalition’s Rebuttal Brief On Challenge* (Nov. 12, 2010), at 1, 3, 10-13.

(internal quotation marks omitted); *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 12 (“it is beyond the scope of the authority and function of the watermaster and/or IDWR to resolve private contract disputes as part of their administrative duties. . . . The watermaster and IDWR are not responsible for getting in the middle of private contract disputes”).

See supra “FACTS.”¹⁴

This Special Master further determined “[t]he Coalition’s suggestion that the BOR’s water rights should incorporate the *Eagle Decrees* is attractive in its simplicity, but misleading in its premise and scope,” *Order Granting Motions For Summary Judgment and Special Master Report And Recommendation* (Mar. 25, 2010), at 11, that the *Eagle Decrees* judges “were merely describing a comprehensive plan of operation developed as part of the Palisades project, nothing more,” *id.* at 12, and incorporating the administrative provisions of the Palisades Contracts into the partial decrees “would insinuate the IDWR Director into contract matters well outside his purview.” *Id.* This Special Master reaffirmed these conclusions as well as his other previous holdings in denying the Coalition’s motion to alter or amend because “it is apparent that the issues [the Coalition] raises now were argued before and addressed” and the Coalition “failed to present newly discovered evidence or any clear error of law.” *Order Denying Joint Motion To Alter Or Amend* (Jul. 29, 2010), at 5-6.

In affirming this Special Master, the Presiding Judge characterized the Coalition’s arguments as “untenable,” *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 13, and explained the “publication only” method of notice” authorized for a

¹⁴ *See also, e.g., Order Denying Motion To Designate Basin-Wide Issue* (Mar. 1, 2009), at 9-11; *Order Granting Motions For Summary Judgment and Special Master Report And Recommendation* (Mar. 25, 2010), at 7, 11-12; *Order Denying Joint Motion To Alter Or Amend* (Jul. 29, 2010), at 5-6; *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 10-13, 17-18, 21-24; *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 3-8, 11-14.

summary supplemental adjudication such as the *Eagle Decrees* confirmed “the procedure was not intended to be binding on non-parties.” *Id.* at 17-18.¹⁵ The Presiding Judge also rejected the Coalition’s subsequent argument that the watermaster’s status as a named party bound the State to the *Eagle Decrees*, given the limited scope and effect of a summary supplemental adjudication.

The Presiding Judge determined such proceedings were intended only for the limited purpose of “recogniz[ing] prospectively the unadjudicated water right for purposes of delivery and administration until such time as the right is contested, if ever, by an aggrieved water user.” *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 4; *see id.* at 8 (stating a summary supplemental adjudication provided “a process whereby a water user, short of undertaking the onerous task of initiating a water adjudication or quiet title action and joining as parties all other water users on the source, could have his or her unadjudicated water right recognized and distributed by the watermaster”); *id.* at 11 (stating a summary supplemental adjudication proceeding “was joined for the limited purpose of recognizing and distributing the water rights according to its relative priority as opposed to distributing the right junior to all previously adjudicated rights as would otherwise be required.”) Thus, a summary supplemental adjudication decree “‘*simply gives a prima facie right to the delivery of so much water.*’” *Id.* at 10 (quoting *Mays v. District Court*, 34 Idaho 200, 201, 200 P. 115, 116 (1921)) (italics added by *Memorandum Decision*).

¹⁵ The Presiding Judge had previously determined “it is undisputed that the *Eagle Decree* Adjudication was commenced pursuant to former Idaho Code § 42-1405 (1948),” a summary supplemental adjudication statute, and also noted “District Judge Theron W. Ward made the finding that the [*Eagle Decree*] adjudication was commenced pursuant to Idaho Code § 42-1405.” *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 12 & n.7

“In sum, the summary supplemental adjudication process served a limited function,” *id.* at 10, and “the *Eagle Decree* did not adjudicate any water rights or other administrative provisions.” *Id.* at 5 (bold omitted; underlining added); *see id.* at 7 (“The summary supplemental adjudication proceeding 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.”) (underlining in original). The Presiding Judge therefore held “the only ‘binding’ effect on the watermaster, IDWR or the State . . . would be to recognize and deliver water in accordance with the *prima facie* showing of the unadjudicated right on an interim basis until such time as the water right is either contested or adjudicated in a subsequent proceeding.” *Id.* at 11. The Presiding Judge concluded: “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 12.

The Presiding Judge also rejected the Coalition’s renewed contentions that even if the *Eagle Decrees* did not require incorporation of the “common plan” provisions into SRBA partial decrees, the provisions still must be so incorporated to affirm and protect the Palisades Contracts. The Presiding Judge cited “the difference between rights that are purely contractual in nature and interests in water rights pursuant to state law,” *id.* at 12, and held that incorporating such contract provisions into the partial decrees would inappropriately inject the watermaster or IDWR into a private contractual dispute:

Finally, it 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 disputes as part of their administrative duties. . . . The watermaster and IDWR are not responsible for getting in the middle of private contract disputes. The contract dispute needs to be resolved in the appropriate forum.

Id. at 14.

D. The Coalition's *Motion* Should Be Denied For The Same Reasons This Special Master And The Presiding Judge Previously Rejected The Coalition's *Eagle Decree* Arguments.

The previous holdings of this Special Master and the Presiding Judge foreclose the Coalition's *Motion* because it relies on the same arguments this Special Master and the Presiding Judge have already rejected. Indeed, the Presiding Judge's holdings mean the Coalition's *Motion* is barred under the doctrine of the law of the case in the SRBA. *See Memorandum Decision And Order On Challenge; And, Order Of Partial Decree, In re SRBA, Subcase 65-05663B (Wood v. Trout)* (May 9, 2002), at 9 ("it is not within the purview of the authority conferred upon a special master to 'reconsider' the prior legal rulings of the district court"); *see also Swanson v. Swanson*, 134 Idaho 512, 516, 5 P.3d 973, 977 (2000) ("The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation").

III. THE COALITION HAS FAILED TO DISTINGUISH THE ISSUES PRESENTED IN ITS *MOTION* FROM THOSE PREVIOUSLY DECIDED BY THIS SPECIAL MASTER AND THE PRESIDING JUDGE.

The Coalition contends this Special Master's and the Presiding Judge's previous decisions do not apply to the Coalition's current *Motion* for two reasons: (1) Section 20 of Article V of the Idaho Constitution made the *Eagle Decrees* binding on all water users; and (2) the question of whether the "administrative provisions" of the *Eagle Decrees* are binding on all water users was not before this Special Master and the Presiding Judge in previous proceedings. These contentions lack merit for the reasons discussed below.

A. Article V § 20 Of The Idaho Constitution Does Not Bind Non-Parties To The Terms Of The *Eagle Decrees*.

The Coalition admits the Presiding Judge held "the *Eagle Decree* does not bind non-parties," *SWC Opening Brief* at 18, but argues this holding was limited to the

summary supplemental adjudication statute and under section 20 of Article V of the Idaho Constitution (“Section 20”), “[t]he district court had jurisdiction to adjudicate administrative provisions that was separate and distinct from the summary supplemental adjudication statutes.” *SWC Opening Brief* at 27. The Coalition argues that while the district court may have lacked authority to make the *Eagle Decrees*’ “administrative provisions” binding on non-parties through the summary supplemental adjudication statute, it had such authority under Section 20.

The Coalition’s argument ignores the difference between subject-matter jurisdiction and personal jurisdiction. Section 20 invests the district courts with subject-matter jurisdiction, but not personal jurisdiction. *State v. Jakoski*, 139 Idaho 352, 355, 79 P.3d 711, 714 (2003) (“The word “jurisdiction” [in Section 20] refers to the subject-matter jurisdiction of the district courts”).¹⁶ Personal jurisdiction is a separate constitutional requirement that must be affirmatively established in each case, generally through personal service:

There must be personal jurisdiction over a party before a court may enter an order against it, whether in a civil or criminal case:

Personal jurisdiction refers to the court’s authority to adjudicate the claim as to the person. That a court has “jurisdiction of a party” means either that a party has appeared generally and submitted to the jurisdiction, has otherwise waived service of process, or that process has properly issued and been served on such party.

State v. Rogers, 140 Idaho 223, 227, 91 P.3d 1127, 1131 (2004) (quoting 20 Am.Jur.2d *Courts* § 70 (1995)).

Hooper v. State, 150 Idaho 497, 500, 248 P.3d 748, 751 (2011).

¹⁶ Section 20 provides as follows: “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.” Id. Const. art. V § 20. The SWC also relies on Idaho Code § 1-705, which provides, in part: “The district court has original jurisdiction . . . In all cases and proceedings.” *SWC Opening Brief* at 24.

Under the Presiding Judge's holdings, the *Eagle Decrees* cannot bind non-parties due to a lack of personal jurisdiction. The Presiding Judge held the "limited procedural due process notice requirements" for commencing a summary supplemental adjudication meant that as a matter of constitutional law the *Eagle Decrees* were incapable of binding non-parties to their terms. *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 8 & n.1; *see also Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 17-18.¹⁷

Nothing in Section 20 is contrary to these conclusions. Section 20 is concerned only with subject matter jurisdiction and does not confer personal jurisdiction in the absence of constitutionally adequate notice. This is especially true when the underlying cause of action – such as the summary supplemental adjudication that resulted in the *Eagle Decrees* – was a specialized statutory proceeding that intentionally authorized limited notice so a water user could avoid "the onerous task of . . . joining as parties all other water users on the source," *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 8, in exchange for limited relief: prospective recognition of an "unadjudicated water right for purposes of delivery and administration" until such time as the water right is contested. *Id.* at 4.

While Section 20 authorizes the district courts to decide summary supplemental adjudication claims, it does not transform such a cause of action into a *de facto* or *de jure* general adjudication that is binding on all water users, including non-parties,¹⁸ nor does it

¹⁷ The Presiding Judge also noted "District Judge Theron W. Ward made the finding that the [*Eagle Decree*] adjudication was commenced pursuant to Idaho Code §42-1405." *Id.* at 12 n.7.

¹⁸ The holdings of this Special Master and the Presiding Judge that the *Eagle Decrees* did not amount to a *de jure* or *de facto* general adjudication binding upon all water users also disposes of the Coalition's argument that "all junior water rights 'take the system as they find it'" because "juniors are 'subject to all prior rights.'" *SWC Opening Brief* at 27. This argument is unavailing because the *Eagle Decrees* did not adjudicate any "prior rights" or binding administrative provisions. *See Memorandum Decision And Order*

create an independent cause of action that binds not only the parties but also all other users. Even under Section 20, such relief must be sought in a general water adjudication. See *In re SRBA Case No. 39576*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995) (“a general water adjudication is a unique type of proceeding . . . [but] . . . is nonetheless a suit within the original jurisdiction of the district court, as conferred by Article V, Section 20 of the Idaho Constitution”).

B. The Coalition’s Argument That Its *Motion* Presents A New Issue Is Contrary To The Record.

The Coalition also argues that previous decisions of this Special Master and the Presiding Judge do not apply to the Coalition’s *Motion* because “[t]hose decisions 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.” *SWC Opening Brief* at 25 (underlining in original). The Coalition contends “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.” *Id.* at 26. The Coalition characterizes the previous decisions of this Special Master and the Presiding Judge as “pure dicta.” *Id.*

1. The Coalition Raised The Issue Of Whether The Administrative Provisions Of The *Eagle Decrees* Are Binding On Junior Water Right Holders in Previous Proceedings Before This Special Master And The Presiding Judge.

These arguments find no support in the record. As the Presiding Judge stated in denying the Coalition’s motion to designate a basin-wide issue on the “common plan”: “The ‘common plan’ alleged in this *Motion* stems entirely from express provisions

On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e) (May 17, 2011), at 4 (holding the *Eagle Decrees* “did not adjudicate any water rights or other administrative provisions”).

included in the Palisades Contracts that were subsequently incorporated by reference into the *Eagle Decrees*. . . . Therefore, what is at issue is the significance and application of the express provisions of *Eagle Decrees* in the SRBA.” *Order Denying Motion To Designate Basin-Wide Issue* (Mar. 1, 2009), at 9 (underlining added). The Presiding Judge also held the Coalition had raised “substantially the same” issue in the Minidoka and Palisades power rights subcases. *Id.*; *see id.* at 11 (referring to “the issues regarding the scope and application of the *Eagle Decrees* already pending before the Special Master”).

Further, the Coalition specifically argued in the Minidoka and Palisades power rights subcases that the *Eagle Decrees* made the “provisions” of the “common plan” for administration binding upon all water users:

The *Eagle Decree* “confirmed, ratified and approved” the “common plan for the administration of the operation of the Snake River” by incorporating certain contract provisions into the decree and making them “binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam.”

Surface Water Coalition’s Joint Opening Brief On Challenge (Oct. 7, 2010), at 77 (underlining added); *see also Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 11 (“One of the issues addressed on summary judgment was whether the terms of the *Eagle Decree* are binding on the USBOR and the State of Idaho”).

The record is replete with the Coalition’s repeated arguments that the *Eagle Decrees* “ratified,” “confirmed,” and “adjudicated” a “common plan” of water rights administration, that the “common plan” consisted of “provisions” of the Palisades Contracts, and that the *Eagle Decrees* made these “provisions” binding on all water users, including “subsequent appropriators” or “junior water users” who were not parties to the

Eagle Decrees and/or Palisades Contracts, and therefore the *Eagle Decrees* and/or the Palisades Contracts must be incorporated into SRBA partial decrees. *See supra*, “FACTS.”¹⁹ The issues presented by the Coalition’s current *Motion* are the same ones the Coalition presented to this Special Master and the Presiding Judge in the Minidoka and Palisades power rights subcase.

The Coalition’s assertion that the only question before this Court in the Minidoka and Palisades power right subcases “was whether or not a provision from the Palisades Contracts should be included on the water rights,” *SWC Opening Brief* at 26, is also contrary to record. The Coalition consistently argued to this Special Master and the Presiding Judge that the provisions in question – the winter power operations and power loss payment provisions – were binding on all water users because they were “key provision[s] included as part of the common plan adjudicated in the *Eagle Decree*.” *Surface Water Coalition’s And Idaho Power Company’s Joint Memorandum In Opposition To State Of Idaho’s And United States’ Motions For Summary Judgment* (Nov. 3, 2009), at 36; *see id.* at 44 (“key component of the ‘common plan of administration’ adjudicated in the *Eagle Decree*.”); *see Surface Water Coalition’s Joint Motion To Alter Or Amend* (Apr. 28, 2010), at 3 (“vital element of the common plan”); *id.* at 8 (“vital part of the ‘common plan’”); *Surface Water Coalition’s Joint Opening Brief On Challenge* (Oct. 7, 2010), at 8 (“Critical to the ‘common plan’ or operation of the Snake River reservoirs is the power

¹⁹ *See, e.g., Surface Water Coalition’s And Idaho Power Company’s Joint Memorandum In Opposition To State Of Idaho’s And United States’ Motions For Summary Judgment* (Nov. 3, 2009), at 19-20, 30-32, 24-26, 38-39, 43-44, 52, 63, 70, 74-75, 78; *Joint Motion To Designate Basin-Wide Issue* (Oct. 2, 2009), at 2, 5-6, 9-10; *Surface Water Coalition’s Reply On Joint Motion To Designate Basin-Wide Issue* (Jan. 14, 2010), at 4-5, 9, 11; *Surface Water Coalition’s Joint Motion To Alter Or Amend* (Apr. 28, 2010), at 2-3, 8-9; *Reply In Support Of Surface Water Coalition’s Joint Motion To Alter Or Amend* (Jun. 22, 2010), at 4; *Notice Of Challenge* (Aug. 12, 2010), at 3, 6; *Surface Water Coalition’s Joint Opening Brief On Challenge* (Oct. 7, 2010), at 4, 8, 22-23, 34-35, 38-40, 44, 46, 48, 55, 62, 66-67, 71, 77, 83; *Surface Water Coalition’s Rebuttal Brief On Challenge* (Nov. 12, 2010), at 1, 3, 10-13.

loss payment provision established through the Palisades Contracts and approved in the *Eagle Decree*."); *id.* at 40 ("key provision included as part of the common plan adjudicated in the *Eagle Decree*").

The Coalition asserted these power provisions "are part and parcel of the exercise of the water rights," *Surface Water Coalition's Rebuttal Brief On Challenge* (Nov. 12, 2010), at 13, and thus had to be specifically referenced in the partial decrees. *Id.* Further, the Coalition emphasized its opposition to the hydropower remark proposed by the State and the Bureau was not based upon any distinction between storage operations and power operations, but rather was grounded in "an administrative scheme that affects all federal facilities in the basin and all water rights associated with those facilities." *Joint Motion To Designate Basin-Wide Issue* (Oct. 2, 2009), at 5 (underlining added); *see id.* at 6 (asserting the "common plan" and should be "incorporated into all decrees in Basin 01") (underlining added); *id.* at 9 ("the common plan applies to all water rights which are satisfied from or affected by operation of these federal facilities") (underlining added); *id.* at 10 (asserting the "common plan" applied to "every water right in the basin") (underlining added); *see also Surface Water Coalition's Joint Opening Brief On Challenge* (Oct. 7, 2010), at 66 ("the *Eagle Decree* was a judicial determination of all the water rights in the Snake River above Milner Dam and a plan for the administration of said rights") (underlining added).

While this Special Master and the Presiding Judge rejected the Coalition's "common plan" arguments and held the winter power operations and power loss payment provisions were merely contractual, the issue they decided in reaching this conclusion is the same one presented by the Coalition's *Motion*: "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.” *SWC Opening Brief* at 25; see *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 11 (“One of the issues addressed on summary judgment was whether the terms of the *Eagle Decree* are binding on the USBOR and the State of Idaho”). The Coalition’s assertion that the issue in the Minidoka and Palisades power rights subcases was simply “whether or not a provision from the Palisades Contracts should be included on the water rights,” *SWC Opening Brief* at 26, is contrary to the record and the Coalition’s specific and repeated arguments to this Special Master and the Presiding Judge in those proceedings.

In sum, it is utterly at odds with the record for the Coalition to argue that it never previously raised the issue of “[w]hether 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,” *SWC Opening Brief* at 25, that “the question about the binding nature of the administrative provisions was not before the Court,” and that only the question was “whether or not a provision from the Palisades Contracts should be included on the water rights.” *Id.* at 26. The record confirms that the issue of whether the “administrative provisions” of the *Eagle Decrees* are binding on all water users, including junior appropriators, has been the central and predominant issue in all of the Coalition’s *Eagle Decrees* arguments in the SRBA.

2. This Special Master And The Presiding Judge Held In Previous Decisions That The Administrative Provisions Of The *Eagle Decrees* Are Not Binding On Junior Water Right Holders.

The Coalition’s assertion that the previous decisions of this Special Master and the Presiding Judge rejecting the Coalition’s “common plan” arguments are “pure dicta” that do not apply to the *Motion* are based on the Coalition’s contention that the issue presented by its *Motion* is different from the issue presented in the Minidoka and

Palisades power rights subcases. *SWC Opening Brief* at 25- 26. This contention is plainly contrary to the record, as demonstrated above.

Accordingly, the Coalition's argument that the previous decisions of this Special Master and the Presiding Judge are irrelevant and "pure dicta," *SWC Opening Brief* at 26, has no merit. To the contrary, the previous decisions of this Special Master and the Presiding Judge squarely addressed the same issue presented by the Coalition's *Motion* and conclusively held that that the *Eagle Decrees* did not adjudicate a "common plan" or any administrative provisions that are binding on non-parties – which necessarily includes junior water rights holders and subsequent appropriators. These decisions are the law of the case and foreclose the Coalition's *Motion*.

Further, this Special Master and the Presiding Judge held that what the Coalition characterizes as "administrative provisions" are simply private contractual rights and obligations that should not be elevated into state-law interests in water rights by incorporating them into partial decrees. *See, e.g., Order Granting Motions For Summary Judgment and Special Master Report And Recommendation* (Mar. 25, 2010), at 11-12 ("there is no evidence that either judge intended to "freeze" the Contracts in place as decreed elements of the water rights or their administration") (underlining added); *id.* at 12 ("such a provision is a contract right, not an element of a water right"); *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 12 ("it is beyond the scope of the authority and function of the watermaster and/or IDWR to resolve private contract disputes as part of their administrative duties. . . . The watermaster and IDWR are not responsible for getting in the middle of private contract disputes").

In short, the record demonstrates that the question repeatedly raised and decided in the Minidoka and Power rights subcases was whether the *Eagle Decrees* “adjudicated” the contractual rights and obligations of the Palisades Contracts, thereby transforming them into a “common plan” of administrative provisions that are binding on all water users, including non-parties and junior appropriators. This Special Master and the Presiding Judge held that the “common plan” did not conclusively “adjudicate” anything and did not make the contractual rights and obligations of the Palisades Contracts binding on non-parties – and therefore it would be inappropriate to incorporate the Palisades Contract provisions into the SRBA water rights decrees. These holdings are directly applicable to the Coalition’s *Motion* and require that it be denied.

3. The Coalition’s Argument That The Presiding Judge’s Holdings Apply Only To “Water Rights” And Not “Administrative Provisions” Is Contrary To The Plain Language And Reasoning Of The Presiding Judge’s Decisions.

The Coalition also attempts to avoid the previous decisions of this Special Master and the Presiding Judge by drawing a distinction between the terms “water rights” and “administrative provisions” as used in the Presiding Judge’s decisions. The Coalition argues the previous 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,” because “the Court’s decisions were very clear: the summary supplemental adjudication statute applies to the adjudication of *water rights*.” *SWC Opening Brief* at 12 (underlining added; italics in original); *see id.* at 26 (“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.”) (underlining added). While the Coalition admits the Presiding Judge held “the *Eagle Decree* did not

adjudicate any water rights or other administrative provisions,” *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 5 (underlining added; bold omitted), the Coalition argues this was dicta because “the question about the binding nature of the administrative provisions was not before the Court in those proceedings.” *SWC Opening Brief* at 26.

The Coalition’s argument that the Presiding Judge’s “common plan” holdings do not apply to the “administrative provisions” of the *Eagle Decrees* is contrary to the plain language of the Presiding Judge’s orders. The Presiding Judge held “the *Eagle Decree* . . . cannot bind non-parties to its terms.” *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 14 (underlining added). The Presiding Judge also held “[t]he State is simply not bound by the terms of the *Eagle Decree*.” *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 12 (underlining added).

It is undisputed the “terms” of the *Eagle Decrees* include the “administrative provisions” that are the basis of the Coalition’s *Motion*. See, e.g., *SWC Opening Brief* at 24 (“In the *Eagle Decree*, the District Court ratified, confirmed and adjudicated certain administrative provisions that were originally developed through the Palisades Contracts”); see also *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 11 (“One of the issues addressed on summary judgment was whether the terms of the Eagle Decree are binding on the USBOR and the State of Idaho”). Thus, the Presiding Judge’s holdings that non-parties are not bound by the “terms” of the *Eagle Decrees*, *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 14; *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 12, explicitly and necessarily rejected any assertion that the “administrative

provisions” of the *Eagle Decrees* are binding on non-parties. Further, it is clear the Presiding Judge’s holdings were directed primarily at resolving the question of the binding effect of the administrative “provisions.” See *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 10-11 (“The [*Eagle*] Decree incorporated by reference and ‘ratified, confirmed and approved’ certain provisions of the Palisades Contracts. The provisions incorporated into the *Eagle Decree* pertained to, among other things”); *id.* at 23 (“The SWC argues that the above-mentioned provisions of the Palisades Contracts . . .”).

The only support the Coalition offers for its eleventh-hour attempt to redefine the issue previously raised as one of “water rights” rather than “administrative provisions” is the fact that in the *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), the Presiding Judge referred primarily to “water rights” in explaining the limited binding effect of summary supplemental adjudication. *SWC Opening Brief* at 26; see also *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 4-12. The Coalition’s argument ignores the fact that the Presiding Judge’s analysis opened with the statement “[t]he *Eagle Decree* did not adjudicate any water rights or other administrative provisions,” and closed with the holding: “The State is simply not bound by the terms of the *Eagle Decree* for the purposes of the proceedings on the above-captioned water right claims.” *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 4, 12 (underlining added). These holdings explicitly apply to the “administrative provisions” that were among the “terms” of the *Eagle Decrees*.

Moreover, the Coalition's argument that the "administrative provisions" are binding even if the "water rights" are not ignores the Presiding Judge's holding that the *Eagle Decrees* were incapable of binding non-parties "given the limited procedural due process notice requirements for commencing such an action." *Id.* at 8 & n.1; *see also Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 17-18. The lack of constitutionally sufficient notice meant that as a matter of constitutional law the *Eagle Decrees* were incapable of binding non-parties for any purpose. The *Eagle Decrees* were incapable of binding non-parties to any "administrative provisions" just as surely as they were incapable of binding non-parties to any "water rights." As the Presiding Judge pointed out, "had the statute intended any binding effect broader in scope and legal effect . . . it would have required the action be brought against" third parties. *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 11. For the same reasons, there is also no merit in the Coalition's related contention the Presiding Judge lacked statutory authority to hold the "administrative provisions" ineffective against non-parties because "the summary supplemental adjudication statute only provided authority relative to the adjudication of water rights." *SWC Opening Brief* at 26. The *Eagle Decrees'* complete lack of any binding effect whatsoever on non-parties forecloses the Coalition's arguments that the *Eagle Decrees* made the "administrative provisions" of the "common plan" binding on non-parties even if the "water rights" were not.²⁰

²⁰ This conclusion necessarily forecloses the Coalition's contention that the *Eagle Decrees* are binding on "all junior water users," *SWC Opening Brief* at 25, which contrary to the Coalition's argument is another issue the Coalition raised in previous proceedings. *See, e.g., Surface Water Coalition's Reply On Joint Motion To Designate Basin-Wide Issue* (Jan. 14, 2010), at 4 ("as well as junior rights which were established later"); *id.* at 9 ("all subsequent appropriators who came onto the River thereafter").

Further, the Coalition's argument that the summary supplemental adjudication statute only applied to "water rights" and not "administrative provisions," *SWC Opening Brief* at 26, is directly contrary to the

IV. AS THIS SPECIAL MASTER AND THE PRESIDING JUDGE HAVE PREVIOUSLY DETERMINED, THE PARTIAL DECREES SHOULD NOT INCORPORATE THE ADMINISTRATIVE PROVISIONS OF THE PALISADES CONTRACTS.

The “only remaining question” after the Coalition’s *Eagle Decrees* argument “has [been] disposed of” is whether the administrative provisions of the Palisades Contracts should be incorporated into the partial decrees. *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 21. This Special Master and the Presiding Judge have previously considered this question and determined it would be inappropriate to incorporate the private contractual provisions of the Palisades Contracts into partial decrees.

As this Special Master stated, “[w]ater right decrees and contracts serve different purposes,” *Order Granting Motions For Summary Judgment and Special Master Report And Recommendation* (Mar. 25, 2010), at 12, and the administrative provisions of the Palisades Contracts are private contract rights, not elements of a water right:

A water right decree describes the nature and extent of the owner’s right to the use of water from a particular water system, whereas a contract memorializes an agreed-upon exchange of promises and consideration between two or more parties. . . . By their very nature, the Palisades Contracts may be amended from time to time as conditions change, all without court intervention such a [contractual hydropower] provision is a contract right, not an element of a water right. Any claim of non-compliance under the Contracts is a matter for the Court of Federal Claims.

Id. (underlining added); *see also Order Denying Joint Motion To Alter Or Amend* (Jul.

29, 2010), at 5-6 (similar). The Presiding Judge came to the same conclusions:

Coalition’s *Motion*, which asserts the district courts had authority to make the “administrative provisions” binding on all water users, including non-parties. This asserted authority had only one possible source: the summary supplemental adjudication statute. *Memorandum Decision And Order On Challenge* (Feb. 9, 2011) at 12 (“it is undisputed that the *Eagle Decree* Adjudication was commenced pursuant to former Idaho Code § 42-1405 (1948)”). If, as the Coalition contends, the summary supplemental adjudication statute did not apply to “administrative provisions,” then the district courts had no statutory authority to adjudicate the “administrative provisions” to begin with, and the Coalition’s central contention collapses.

The Special Master correctly identified in his *Order* that a difference exists between pure contractual rights and interests in a water right under state water law. *Order Granting*, p. 12. Any issue pertaining to whether the USBOR's decision to voluntarily subordinate its rights results in a breach of the Palisades Contracts, or in a monetary claim in favor of the SWC, is not ripe for jurisdiction before this Court and does not create a state law interest in the USBOR's water rights in favor of the SWC. Any such issue or claim lies in the jurisdiction of the United States Court of Federal Claims. 28 U.S.C. § 1491(a)(1).

Memorandum Decision And Order On Challenge (Feb. 9, 2011), at 24; *see also Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 12 (same). The Presiding Judge also emphasized that it is not appropriate to elevate private contractual rights to the level of state law-based water rights, which risks putting the watermaster and/or the Department in the position of mediating private contractual disputes:

Finally, it 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 disputes as part of their administrative duties. . . . The watermaster and IDWR are not responsible for getting in the middle of private contract disputes. The contract dispute needs to be resolved in the appropriate forum.

Id. at 14.

These holdings are the law of the case and therefore the Coalition's *Motion* should be denied. The *Motion* explicitly seeks to incorporate private contractual rights and obligations regarding reservoir administration and operations into the partial decrees for American Falls and Palisades reservoirs. As this Special Master and the Presiding Judge have previously held, such administrative provisions are private contract rights, not elements of state law-based water rights. The Palisades Contracts are subject to amendment at any time without court action. Such private rights should not be elevated to interests in state law water rights, nor should they be frozen in water right decrees.

Incorporating private contractual provisions regarding reservoir administration and operations into the partial decrees would inappropriately and unnecessarily inject the watermaster and/or the Department into private contract disputes.

These conclusions are in no way undermined by the fact that under *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the spaceholders have a beneficial ownership interest in the American Falls and Palisades water rights for storage purposes that they did not have in the water rights at issue in the Minidoka and Palisades power rights subcases. The spaceholders' ownership interest will be reflected in a separate ownership remark. *See id.* at 115, 157 P.3d at 609 (reciting remark); *see also Stipulation To Resolve Certain Objections* (Jan. 25, 2012), at 4-6 (reciting remark).²¹ It is not necessary to incorporate provisions of the Palisades Contracts into the partial decrees to protect the spaceholders' beneficial ownership interest in the water rights. Indeed, incorporating provisions of the Palisades Contracts addressing reservoir administration and operation in the partial decrees could imply an additional state-law based interest beyond that recognized in *Pioneer*, and lead to ambiguity rather than clarity for purposes of water rights administration.

V. THE ADMINISTRATIVE PROVISIONS OF THE PALISADES CONTRACTS ARE NOT NECESSARY FOR THE DEFINITION OR ADMINISTRATION OF THE WATER RIGHTS FOR AMERICAN FALLS AND PALISADES RESERVOIRS.

The Coalition nonetheless argues the administrative provisions of the Palisades Contracts must be incorporated into the partial decrees for the American Falls and Palisades water rights because remarks referencing the contractual provisions are

²¹ While the City of Pocatello has not agreed to the ownership remark in the *Stipulation*, it is the State's understanding that the City is not categorically opposed to any ownership remark at all, but only to the specific language of the remark in the *Stipulation*.

necessary to define or efficiently administer the water rights. *SWC Opening Brief* at 14-21. Idaho law provides that such remarks should be incorporated into partial decrees only if “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). The Presiding Judge recently stated that partial decrees should not include such textual remarks “unless . . . determined to be absolutely necessary.” *Order Denying Request For Attorney’s Fees And Costs, Subcase No. 37-21112* (May 4, 2012), at 4. The remark sought by the Coalition falls short of these standards.

A. This Special Master And The Presiding Judge Have Determined That Provisions Of The Palisades Contracts Regarding Reservoir Administration Are Not Necessary To Define Or Administer The Bureau’s Water Rights.

The Coalition justifies its proposed remark by arguing that the contractual provisions the remark would incorporate – either by explicit reference to the *Eagle Decrees* and their exhibits or by reference to textual provisions the Coalition proposes to append to the partial decrees in an “attachment”²² – are necessary to administer the American Falls and Palisades water rights. *See, e.g., SWC Opening Brief* at 14-21. The previous decisions of this Special Master and the Presiding Judge rejected this contention.

As previously discussed, the Coalition repeatedly argued that the administrative provisions of the “common plan” – that is, the provisions of the Palisades Contracts addressing reservoir administration and operations – should be incorporated in the Bureau’s water rights – and indeed all water rights in Basin 1 – because they were part and parcel of the water rights and necessary for administration. This Special Master and the Presiding Judge determined that these administrative provisions only set forth private

²² *See Motion* at 2 & “Exhibit 1.”

contractual rights and obligations, and should not be incorporated into the partial decrees. Among other things, doing so risks putting the watermaster and the Department in the position of mediating private contract disputes, which is beyond their statutory duties and authorities. Putting the watermaster and/or the Department in such a position unnecessarily and inappropriately blurs the line between private contract rights and water rights, and would complicate water rights administration rather than make it more efficient.

These holdings necessarily rejected the Coalition's argument that the provisions of the Palisades Contracts are necessary to define, clarify or administer the Bureau's water rights. The previous decisions of this Special Master and the Presiding Judge demonstrate it is not "absolutely necessary" to incorporate the administrative provisions of Palisades Contracts into the partial decrees for the American Falls and Palisades water rights via a remark. *Order Denying Request For Attorney's Fees And Costs, Subcase No. 37-21112* (May 4, 2012), at 4; Idaho Code § 42-1411(2)(j). The Coalition's *Motion* should be denied as foreclosed under these previous decisions and the law of the case.

B. It Is Undisputed That The American Falls And Palisades Water Rights Have Been Efficiently Administered Even Though The Licenses Have Never Incorporated Or Referenced The Administrative Provisions Of The Palisades Contracts.

The record is also clear that it is not necessary to incorporate the administrative provisions of the Palisades Contracts into the partial decrees in order to define or administer the American Falls and Palisades water rights. The licenses for the American Falls and Palisades water rights do not incorporate or reference the Palisades Contracts, *See Affidavit Of Michael C. Orr* (Feb. 21, 2012), Exhibit 30 (American Falls license),

Exhibit 60 (Palisades license),²³ but even so the rights have been efficiently administered, as Water District 1 Program Manager Tony Olenichak confirmed in his deposition. *Affidavit Of Travis L. Thompson In Support Of Surface Water Coalition's Joint Memorandum In Opposition To The State Of Idaho's Motion For Partial Summary Judgment* (Apr. 16, 2012) ("*Thompson Aff.*"), Exhibit 41, p. 346, ll. 2-12. This undisputed fact conclusively demonstrates it is not necessary to incorporate the Palisades Contract provisions into the partial decrees. *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 116, 157 P.3d 600, 610 (2007) ("the Boise Project has operated successfully for almost a century without such specificity in decrees or licenses. . . . The Boise Project water rights have been administered successfully without the specificity requested by the cross-appellants.").²⁴

C. The Coalition's Remark Is Contrary To Idaho Law And The Record Because It Ignores The Distinction Between The Administration Of State Law Water Rights To Divert Natural Flow And Private Contractual Rights To Water That Has Been Stored In A Reservoir.

The Coalition's argument that the contract provisions are necessary to administer the American Falls and Palisades water rights also ignores the crucial distinction between the administration of state law water rights to divert natural flow versus the administration of contract rights for water that has been stored in a reservoir. This distinction is well established in Idaho law.

²³ Further, the Palisades license was issued after the Palisades Contracts and the *Eagle Decrees*, yet it did not incorporate or reference the contracts or the decrees. Had the Palisades Contracts and/or the *Eagle Decrees* been viewed as necessary to define or administer the Palisades water rights, they certainly would have been incorporated into or referenced in the license. The fact that they were not confirms that the Palisades Contracts and the *Eagle Decrees* were not intended to define or amend the water rights for American Falls or Palisades reservoirs.

²⁴ It was argued in *Pioneer* that the partial decrees for several Bureau reservoirs in Basin 63 should identify the storage spaceholders and their allocations. 144 Idaho at 116, 157 P.3d at 610. The Idaho Supreme Court rejected this argument because this information was in the contracts. *Id.*

1. Idaho Law Distinguishes Between The Water Rights Established Under State Law To Divert Natural Flow And Contractual Rights To Water That Has Been Stored In A Reservoir.

Idaho law requires that a water user have a valid water right to divert public waters from a natural watercourse. Idaho Code § 42-201. Once water has been diverted from a natural stream into a reservoir, however, “it [i]s no longer ‘public water’ subject to diversion and appropriation under the provisions of the Constitution (article 15, § 3),” but rather is “water ‘appropriated for sale, rental or distribution’ in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution.” *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943, 945 (1935). Such stored waters are “[t]he property of the appropriators and owners of the reservoir,” albeit “impressed with the public trust to apply it to a beneficial use.” *Id.*

In short, a water right to divert natural flow into a reservoir does not factor into the distribution and allocation of the water once it has been stored in the reservoir. While state law-based water rights govern the distribution of natural flow, the allocation and distribution of water that has been diverted into a federal reservoir pursuant to a valid water right is a private matter between the Bureau and its spaceholders governed by contractual provisions and federal law.

This distinction is also recognized in the Idaho Code. Compare chapter 6, title 42 Idaho Code (“Distribution Of Water Among Appropriators”) with chapter 8, title 42, Idaho Code (“Distribution Of Stored Water”). It also applies in the administration of Water District 1. Tony Olenichak confirmed in his deposition that “the distribution of the water that accrues to a reservoir storage right is controlled by the contracts between the Bureau and the spaceholders,” *Thompson Aff.*, Ex. 41, p.332, ll. 9012, and that

“[a]dministering the reservoir rights . . . is a separate thing than accounting for individual storage use.” *Id.*, p.337, ll. 22-25.

2. The Administrative Provisions Of The Palisades Contracts Apply To The Allocation Of Stored Water And Are Not Necessary To Administration Of The Water Rights To Divert Natural Flow Into American Falls And Palisades Reservoirs.

While the administrative provisions of the Palisades Contracts are important for administration of the spaceholders’ contract rights to water stored in the American Falls and Palisades reservoirs, they do not address or implicate administration of the water rights to divert natural flow into American Falls and Palisades reservoirs. A review of the “administrative provisions” confirms this conclusion: the provisions in questions pertain solely to the allocation and distribution of water stored in the reservoirs.

The proposed “Winter Water Savings” provision²⁵ is, as the Coalition admits, simply an agreement among spaceholders that a portion of the existing storage space in the reservoirs will be allocated as “first to fill” for the benefit of certain entities that forego winter diversions. *SWC Opening Brief* at 9. Thus, this provision pertains to storage administration, not natural flow administration.²⁶

The proposed provision regarding an exchange between Jackson Lake and American Falls²⁷ is, as its title implies, nothing more than a spaceholder agreement consenting to an exchange of storage space allocations: “This provision effected an exchange of storage space held by NSCC and BID in Jackson Lake Reservoir, with

²⁵ *Motion*, Exhibit 1 at 1-2 (“Winter Water Savings”).

²⁶ While the State opposes the Coalition’s proposal to implement the “winter water savings” provision through the remark proposed by the *Motion*, the State continues to support implementation of this provision through the decree of separate water rights. *See Stipulation To Resolve Certain Objections* (Jan. 26, 2012), at 2. Such water rights would not injure any other water rights holders or subject them to additional obligations because they would simply advance by one day the priority of a portion of the existing water rights. *Id.*

²⁷ *Motion*, Exhibit 1 at 3-4 (“Exchange Between Jackson Lake and American Falls Reservoir”).

storage space held by the Upper Valley Water Users in the American Falls Reservoir.” *SWC Opening Brief* at 10. Nothing in this provision concerns or implicates the administration of any water rights to divert natural flow – and it makes no reference to Palisades storage space whatsoever.

The proposed administrative provision regarding “Temporary Upstream Storage”²⁸ also explicitly pertains to reservoir operations and storage space administration. It confirms that the shared “purpose” of the Bureau and the spaceholders is that the reservoir system should be “operated . . . to effect the greatest practicable conservation of water,” by holding “stored water” in the “space that is farthest upstream,” via “annual exchanges of storage space.” *Motion*, Exhibit 1 at 5. Thus, this provision is also confined to the contractual administration of stored water.

Further, there is no merit in the Coalition’s argument that this provision is necessary to prevent legal challenges to reservoir system operations that maximize conservation by holding water in the reservoir space “that is farthest upstream.” *SWC Opening Brief* at 14. Such operational practices are firmly supported by the most basic principles of Idaho water law. As the Idaho Supreme Court has repeatedly stated: “‘The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.’” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (citation omitted). Mr. Olenichak stated that such storage administration and reservoir operations would be allowed even without the provision incorporated as a remark. *Thompson Aff.*, Ex. 41, pp. 316-17. Moreover, such reservoir operations and storage exchanges do not enlarge the water rights or otherwise

²⁸ *Motion*, Exhibit 1 at 5.

injure other water users. Consequently, other water users would have no legal basis to challenge such reservoir operations in any event.

The proposed provision concerning Minidoka Irrigation District storage space²⁹ goes into considerable detail regarding storage space allocations, storage space exchanges, rights to holdover stored water, and other matters concerning storage administration and reservoir operations. While this provision could potentially be important to the administration of Minidoka Irrigation District's storage space and storage allocations, it has nothing to do with administering the water rights to divert natural flow into American Falls or Palisades reservoirs.

The last proposed administrative provision only pertains to the measurement of pump diversions by the Michaud Division,³⁰ and also to accounting for its use of its storage water allocation. *Motion*, Exhibit 1. There is nothing pertaining to natural flow water rights or administration.

Further, the Coalition's arguments are clear that even the Coalition views these provisions implicating storage administration and reservoir operations rather than the administration of the water right to divert natural flow into American Falls and Palisades reservoirs. *See, e.g., SWC Opening Brief* at 3 ("the Palisades Contracts provisions governing storage operations and administration"); *id.* at 9 ("This provision effected and exchange of storage space"); *id.* ("Provisions which allow MID to annually exchange storage"); *id.* at 10 ("administration of storage"); *id.* at 13 ("The storage operations and resulting administration directly resulted from these provisions"). While the Coalition argues that such storage provisions must be included in the water rights because they

²⁹ *Motion*, Exhibit 1 at 6-7.

³⁰ *Motion*, Exhibit 1 at 8.

address matters such as “the physical location of the storage water and its administration,” *id.* at 13, Tony Olenichak testified that “[w]here the water is held is not part of any [water rights] administration.” *Thompson Aff.*, Ex. 41, p. 202, l. 23 to p. 203, l.3.³¹

Further, attaching to the partial decrees and incorporating into them by reference the eight pages of contractual language that constitutes the “administrative provisions” will needlessly impede rather than promote efficient administration of the decreed water rights. Finally, none of the proposed administrative provisions purport to amend the Bureau’s water rights for American Falls or Palisades reservoirs. None of the provisions contemplates that they will bring about a change in the administration of those water rights, or that any change is necessary to achieve the provisions’ purposes. This is also true of the *Eagle Decrees*. Perhaps the most direct evidence of the Coalition’s misplaced reliance on the Palisades Contracts and the *Eagle Decrees* as a basis for the Coalition’s proposed remark is that the Palisades Contracts and the *Eagle Decrees* simply ignore the Bureau water rights for the two reservoirs, and focus exclusively on the spaceholders’ contractual storage rights in those reservoirs. It was never contemplated that the Palisades Contracts or the *Eagle Decrees* affected or would become part of the Bureau’s water rights for American Falls or Palisades reservoirs. This conclusion is supported by the fact that the license for the Palisades water right, which was issued only a few years

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[MR. THOMPSON] Q. Do you know when the Water District started administering water rights in this manner [storing water in unoccupied spaces of upstream reservoirs]? You said that wasn’t part of your administration, or it is? I’m confused.

[MR. OLENICHAK] A. Where the water is held is not part of any administration.

Thompson Aff., Ex. 41, pp. 202-03.

after the *Eagle Decrees*, contains no reference whatsoever to the Palisades Contracts or the *Eagle Decrees*

Accordingly, it is not necessary to incorporate any of the administrative provisions of the Palisades Contracts identified by the Coalition into the partial decrees for the American Falls and Palisades water rights in order to define, clarify or administer the rights. Idaho Code § 42-1411(2)(j). It certainly cannot be deemed “absolutely necessary” to do so. *Order Denying Request For Attorney’s Fees And Costs, Subcase No. 37-21112* (May 4, 2012), at 4.

For the same reasons, any remark stating that “[t]he delivery of water to this right” is or may be subject to provisions of the *Eagles Decrees* or the Palisades Contracts – such as the Coalition’s proposed remark, *Motion* at 2 (underlining added), and also the remark recommended by the Director – is simply incorrect. The water delivered to the American Falls and Palisades water rights is natural flow, while the administrative provisions of the Palisades Contracts and the *Eagles Decrees* deal exclusively with the distribution of stored water. Thus, any such remark would be factually and legally incorrect, and certain to engender confusion and inefficiency in water rights administration.

The Coalition’s argument glosses over these matters and simply assumes that anything having to do with the allocation and administration of stored water is also integral to the administration of the water rights to divert natural flow into the reservoirs. Such an assumption is contrary to Idaho law, which has long distinguished between “‘public water’ subject to diversion and appropriation” and water stored in a reservoir, which has already been “‘appropriated for sale, rental or distribution’” and is “[t]he

property of the appropriators and owners of the reservoir.” *Washington County Irr. Dist.*, 55 Idaho at ___, 43 P.2d at 945 (citations omitted).

The Coalition also focuses on the importance to the spaceholders of the private rights and obligations defined in the administrative provisions of the Palisades Contracts. *See generally SWC Opening Brief* at 14-21. While the State acknowledges the Coalition’s impassioned and detailed discussions of why these provisions are important to spaceholders, their importance to the contracting parties does not provide a legal basis for incorporating private contractual rights and obligations into the partial decrees.³²

3. The Coalition’s Arguments Ignore The Difference Between Water Rights To Divert Natural Flow Into Storage And Contractual Rights To Use Stored Water.

State-law based water rights to divert natural flow into a reservoir for storage purposes are often referred to as “storage rights.” Private contractual rights to the water diverted into in the federal reservoirs in Water District 1 also are often referred to as “storage rights,”³³ or even as “water rights.” *See Pioneer*, 144 Idaho at 116, 157 P.3d at 610 (referring to the amount of a storage allocation in a Bureau reservoir as “the quantity of the water right owned”). While these two types of “storage rights” or “water rights” are legally distinct, as previously discussed, the Coalition’s arguments ignore this important distinction.

³² As this Special Master and the Presiding Judge have held, the SRBA is not the appropriate forum for the spaceholders to seek protection of their private interests in the administrative provisions of the Palisades Contracts. The United States Court of Federal Claims is the appropriate forum for validating such private contractual interests. *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 24; 28 U.S.C. § 1491(a)(1).

³³ This common convention is confirmed by the Coalition’s proposed administrative provisions. *See, e.g.*, Motion, Exhibit 1 at 3 (referring to the “various upper valley holders of storage rights in American Falls Reservoir”); *id.* at 5 (referring to “the water users having storage rights in the reservoir system”); *see also id.* at 6 (referring to “the District’s natural flow rights and rights to water stored in Palisades and American Falls Reservoir”).

The Coalition argues the “administrative provisions” must be included in the partial decrees because they are necessary to administer the “storage rights.” *See, e.g., SWC Opening Brief* at 3 (“the Special Master should grant the Coalition’s motion and recommend a remark for the storage water rights properly referencing these administrative provisions”); *id.* at 5 (“Since the above provisions are necessary for the administration of the storage water rights, each should be either be properly referenced on, or attached to, the partial decrees”); *id.* at 6 (referring to “administration of Reclamation’s storage rights”). Similarly, the Coalition incorrectly equates “storage operations and administration,” *SWC Opening Brief* at 3, with the administration of water rights to divert natural flow into reservoir storage.

The Coalition’s reliance on the ambiguous term “storage rights” is misplaced because under Idaho law, the administration of the Bureau’s water rights to divert natural flow into the reservoirs does not also involve the allocation or distribution of stored water among the spaceholders. The fact that state law-based water rights to divert natural flow and contractual rights to water that has been stored in a reservoir types both can loosely be characterized as “storage rights” or “water rights” does not mean there is no legal distinction for purposes of decreeing and administer the water rights for American Falls and Palisades reservoirs. While the “administrative provisions” of the Palisades Contract may be “necessary” to the “administration” of the spaceholders’ contractual “storage rights,” they are not necessary to the entirely separate matter of administering the American Falls and Palisades water rights. Idaho Code § 42-141(2)(j).

The Coalition’s reliance on the Tony Olenichak’s deposition testimony is unavailing for the same reason: his testimony was clear that the “administrative

provisions” were part of administering spaceholder storage allocations, not the Bureau’s diversions of natural flow into the reservoirs. As the Coalition’s brief demonstrates, Mr. Olenichak testimony simply confirmed that the “administrative provisions” applied to administration of the spaceholders’ contract rights to stored water. *See, SWC Opening Brief* at 16 (“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.* (Q. . . . knowing the allocation for each canal, knowing the storage entitlement is part of your administration? A. It is part of it, yes.”). Further, as previously discussed, Mr. Olenichak testified that Water District 1 recognizes the distinction between administering natural flow pursuant to state law and administering storage pursuant to the Palisades Contracts.

In sum, it is not necessary for the definition or administration of the American Falls and Palisades water rights to incorporate into the partial decrees the provisions of the Palisades Contracts. Idaho Code §§ 42-1411(2)(j), 42-1412(6). To the contrary, doing so would heighten the risk of inefficient water rights administration and inappropriately elevate private contractual rights and obligations to the level of state law, potentially making them binding on all other water users – and would effectively nullify the previous holdings of this Special Master and the Presiding Judge that the *Eagle Decrees* were not general adjudications and did not bind non-parties. The Coalition’s argument that the “administrative provisions” of the Palisades Contracts must be incorporated into the partial decrees is unavailing because it ignores the distinction between state law water rights to divert natural flow into reservoirs for storage purposes and purely contractual rights to an allocation of the water stored in the reservoirs.

CONCLUSION

This Special Master and the Presiding Judge have already rejected the Coalition's argument that the *Eagle Decrees* adjudicated "administrative provisions" that are binding on all water users, and there is no merit in the Coalition's contrary arguments. This Special Master and the Presiding Judge have also determined the "administrative provisions" are merely contractual rights and obligations rather than elements of water rights, and should not be incorporated into the SRBA's partial decrees. Finally, the Coalition's arguments that the "administrative provisions" are necessary for the definition or administration of the American Falls and Palisades water rights are contrary to the law and the undisputed facts. For the reasons set forth herein, the State respectfully requests that this Special Master deny the *Surface Water Coalition's Joint Motion For Partial Summary Judgment*, filed in these subcases on April 19, 2012.

Respectfully submitted this 8th day of June 2012.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
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Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 8TH day of June 2012, I caused the foregoing MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S RESPONSE TO SURFACE WATER COALITION'S MOTION FOR PARTIAL SUMMARY JUDGMENT be filed with the Court and true and correct copies served on the following parties by the methods indicated:

1. Original to:

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ATTACHMENT A

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01-02064L
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01-10053A
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(American Falls Subcases)

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