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DEPARTMENT OF
WATER RESOURCES

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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

)
) Subcase Nos. See Attachment A
)

) **RESPONSES TO A&B IRRIGATION**
) **IRRIGATION DISTRICT'S FIRST SET**
) **OF DISCOVERY REQUESTS TO THE**
) **STATE OF IDAHO**
)

The State of Idaho hereby responds to *A&B Irrigation District's First Set Of Discovery Requests To The State Of Idaho*, dated May 25, 2012 ("the Discovery Requests").

GENERAL OBJECTIONS

1. The State of Idaho, hereinafter referred to as the "State," has not completed its own investigation and/or discovery. Accordingly, the responses that follow are based upon the best knowledge, information, and belief of the State at this time. The State reserves the right to make any further responses if it appears that any omission or error has been made in connection with these responses or that more accurate information is, or has become available. These responses are made without prejudice to the State's right to use later discovery or to present at, during or prior to trial such evidence, as may be later discovered or evaluated.

2. The State objects to the Discovery Requests to the extent the definitions and instructions therein purport to require discovery responses beyond that required under the Idaho Rules of Civil Procedure. These responses are provided in accordance with the Idaho Rules of Civil Procedure regardless of any definitions and instructions in the Discovery Requests.

3. These responses are subject to all objections, including, but not limited to, competence, relevance, materiality, and admissibility. These responses are further subject to all objections that would require the exclusion of any statement, material, or information herein provided if such interrogatory were asked of, or any statement, material, or information provided were made by witnesses present and testifying in court. All such objections are reserved and may be interposed at the time of trial. Information otherwise responsive to the Discovery Requests that is not provided on the basis of a claim of privilege is identified in the "privilege log" appended hereto.

4. No incidental or implied admissions are intended. The fact that the State has responded to any discovery request, or part thereof, should not be taken as an admission that the State accepts that the discovery request or the response or objection thereto constitutes

admissible evidence. Similarly, the fact that the State has responded to all or part of an interrogatory is not intended to, and shall not be construed to be a waiver by the State of all or part of any objection to other interrogatories. The State's answers to any the Discovery Requests do not constitute a waiver of the State's right to object to any future additional, or supplemental discovery requests regarding the same or similar matters.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1: Please state the name, phone number and last known address of each person providing information relating to the answers you provided to these Discovery Requests.

ANSWER TO INTERROGATORY NO. 1:

Anthony Olenichak
Program Manager
Water District No.1
900 North Skyline Drive
Idaho Falls, Idaho 83402
(208) 525-7171

Liz Cresto
Technical Hydrologist
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
(208) 287-4800
The only information Ms. Cresto provided was the URL link to the Water District No. 1 annual reports on the Department's website. See footnote 3.

Brian Patton
Chief, Water Planning Bureau
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
(208) 642-4465

Helen Harrington
Manager, Planning Section
Water Planning Bureau
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
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The only information Mr. Patton and Ms. Harrington provided was that the State, through the Idaho Water Resources Board, has rights to Palisades storage under Contract No. 14-06-100-1836 pursuant to an assignment of that contract from FMC Corporation to the State. See Responses to Requests For Admission Nos. 1 & 2.

INTERROGATORY NO. 2: Please separately identify each person who, according to your information or knowledge of the information or knowledge of your representatives, has relevant knowledge of the issues raised by your Objections to the Director's recommendations for the storage claims and state the substance of the facts and opinions which constitute such relevant knowledge.

ANSWER TO INTERROGATORY NO. 2: The State objects to this Interrogatory as combining several separate interrogatories, I.R.C.P. 33(a)(3). The State also objects to this Interrogatory to the extent it seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection the State answers as follows. The issues identified in the State's objections regarding hydropower subordination and Idaho Power Company contracts have been resolved and are no longer at issue in these subcases. The State also objects to this Interrogatory as vague and ambiguous, and as calling for legal conclusions, regarding what constitutes "relevant" knowledge of the title ownership language issue identified in the State's objections. Without waiving this objection, the State answers that the title ownership issue is not a factual matter but rather a legal question to be resolved under *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007).

INTERROGATORY NO. 3: Please separately identify each person who, according to your information or knowledge of the information or knowledge of your representatives, has relevant knowledge of the issues raised by your Responses to the objections to the storage claims and state the substance of the facts and opinions which constitute such relevant knowledge.

ANSWER TO INTERROGATORY NO. 3: The State objects to this Interrogatory as combining several separate interrogatories, I.R.C.P. 33(a)(3). The State also objects to this Interrogatory as misstating facts to the extent it asserts the State raised issues by responding to other parties' objections. Without waiving this objection, the State answers as follows. The State's responses to other parties' objections to the Director's Reports for Subcase Nos. 01-2064 and 01-2068 did not raise any issues but rather notified the Court and the parties that the State desired to participate in the proceedings on the objections to which the State responded. Any issues raised by the objections to which the State responded were raised by the objecting parties, not by the State, and the objections often included little or no description of the specific issues they sought to raise.

To the extent this Interrogatory asks the State to identify persons having “relevant” knowledge of the issues raised by the objections to which the State responded, the State objects to this Interrogatory as vague and ambiguous, calling for legal conclusions, and seeking information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, the State answers as follows. The objections to which the State responded frequently consisted of nothing more than unexplained checkmarks on the Standard Form 1 that do not specifically identify the issues the objectors seek to raise, and therefore the State does not know which persons, if any, have “relevant” knowledge of the issues that the objecting parties may have been attempting to raise in such objections. To the extent the objections to which the State responded raise the issues of hydropower subordination and Idaho Power Company contracts, those questions have been resolved and are no longer at issue in these subcases, and to the extent the objections to which the state responded raise the issue of title ownership, that issue is not a factual matter but rather a legal question to be resolved under *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007). To the extent the objections to which the State responded raised issues related to the issues stated in the State’s pending motion for partial summary judgment, the State identifies the following person as having potentially “relevant” knowledge:

Anthony Olenichak
Program Manager
Water District No.1
900 North Skyline Drive
Idaho Falls, Idaho 83402
(208) 525-7171

INTERROGATORY NO. 4: Please separately identify each person who is making decisions on behalf of the State of Idaho in these proceedings.

ANSWER TO INTERROGATORY NO. 4: The State objects to this Interrogatory as vague and ambiguous: a myriad of “decisions” are made during the course of litigation, and it is not possible to determine from this Interrogatory the scope of the “decisions” that are the subject of the Interrogatory. Without waiving this objection, the State answers that pursuant to Idaho Code § 42-1401C, the attorney general is authorized to represent the position of the State of Idaho in these proceedings. Such representation includes the authority to make decisions on behalf of the State as to the legal arguments that will be presented to the Court.

INTERROGATORY NO. 5: Please identify each and every witness you intend to call (or may call) at the trial in this matter and state the addresses and phone numbers of each and every witness so identified. With respect to each of the witnesses so identified, please identify the person as a fact or expert witness and state the subject matter and general substance of the facts and opinions to which he or she is expected to testify.

ANSWER TO INTERROGATORY NO. 5: The State objects to this Interrogatory as combining several separate interrogatories. I.R.C.P. 33(a)(3). Without waiving this objection, the State answers as follows. The State has not yet identified the witnesses, if any, that it intends to call at trial. The State identifies below persons that the State may call as witnesses, and for each describes the subject matter and general substance of their expected testimony if they are called as witnesses:

Anthony Olenichak
Program Manager
Water District No.1
900 North Skyline Drive
Idaho Falls, Idaho 83402
(208) 525-7171

If Mr. Olenichak testifies, the subject matter and general substance of his testimony may include current and historic administrative practices and procedures in Water District No. 1, and/or the origin, interpretation, and effect of the language proposed in the third count of the *State Of Idaho's Motion For Partial Summary Judgment* (Jan. 25, 2012).

Rex R. Barrie
Watermaster, Water District No. 63
10769 West State Street
P.O. Box 767
Star, Idaho 83669
(208) 908-5480

If Mr. Barrie testifies, the subject matter and general substance of his testimony may include current and historic administrative practices and procedures in Water District No. 63, and/or the interpretation and effect of the language proposed in the third count of the *State Of Idaho's Motion For Partial Summary Judgment* (Jan. 25, 2012).

Ron Shurtleff
Watermaster, Water District No. 65
102 N. Main
Payette, Idaho 83661
(208) 642-4465

If Mr. Shurtleff testifies, the subject matter and general substance of his testimony may include current and historic administrative practices and procedures in Water District No. 65, and/or the interpretation and effect of the language proposed in the third count of the *State Of Idaho's Motion For Partial Summary Judgment* (Jan. 25, 2012).

Elizabeth Ann Cresto
Technical Hydrologist
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
(208) 287-4800

If Ms. Cresto testifies, the subject matter and general substance of her testimony may include current and historic administrative practices and procedures in Water District No. 63 and Water District No. 65, and/or the interpretation and effect of the language proposed in the third count of the *State Of Idaho's Motion For Partial Summary Judgment* (Jan. 25, 2012).

INTERROGATORY NO. 6: Please identify each and every consultant or expert who has been consulted in connection with this proceeding or who has been employed or retained or engaged by you in connection with this matter, whether or not the person is expected to testify at trial. With respect to each of the persons so identified, please provide the following:

- a. A complete statement of all opinions to be expressed and the basis and reasons therefore;
- b. A complete description of the data or other information considered by the person in forming his or her opinions;
- c. Any exhibits to be used as a summary of or support for the opinions;
- d. Any qualifications of the person, including a list of all publications authored by the person within the preceding 10 years;
- e. Compensation to be paid for the expert's work and testimony, including who is responsible for paying such compensation;
- f. Listing of case and number for any case in which the witness has testified as an expert at trial or by deposition within the preceding four years.; and
- g. Whether or not the person is expected to testify at trial.

ANSWER TO INTERROGATORY NO. 6: The State objects to this Interrogatory as combining several separate interrogatories, I.R.C.P. 33(a)(3), and to the extent it seeks information that is not discoverable pursuant to I.R.C.P. 26(b)(4)(B). Without waiving these objections, the State

answers as follows. The State has not retained any expert witnesses who are expected to testify at trial. If in the future the State retains any expert witnesses who are expected to testify at trial, the State will disclose any such expert witnesses pursuant to the requirements of the Idaho Rules of Civil Procedure and the Court's orders.

INTERROGATORY NO. 7: Please separately identify and describe each document and/or communication which is relevant or which you intend to offer into evidence at the trial in this action for any purpose.

ANSWER TO INTERROGATORY NO. 7: The State objects to this Interrogatory as vague and ambiguous, and as calling for legal conclusions, to the extent it seeks "relevant" documents and/or "communications." Without waiving these objections, the State answers as follows. Until the issues to be decided at trial are identified and their scope defined, which depends in part upon resolution of the pending motions for summary judgment and the pending petition to designate Basin-Wide Issue No. 17, the State cannot determine which documents and/or "communications" may be "relevant" or offered into evidence at trial. Depending on the outcome of the pending motions for summary judgment and the pending petition to designate Basin-Wide Issue No. 17, the following documents and/or "communications" are potentially "relevant" and may be offered into evidence at trial:

- (a) Any affidavit filed in these subcases, including exhibits;
- (b) The transcripts of the deposition of Anthony Olenichek, taken on February 9, 2012 and continued on March 21, 2012, including the deposition exhibits;¹
- (c) Any of the "Related Documents" available on the website of the Idaho Department of Water Resources for the following water rights: 01-2064, 01-10042, 01-10053, 01-0284, 01-2040, 01-0006, 01-4052, 01-2068, 01-10043, 01-4056, 01-4057, 01-4055, 01-10044, 01-10045, 21-2156, 21-4156, 21-4157, 21-10560, 21-4155, 25-7004, 01-0219, 01-10034, 01-4050, 65-2927, 65-2927A, 65-2927B, 65-2917, 65-9483, 63-303, 63-5262, 63-3613, 63-3614, 63-3618, 63-5263, 63-5264, 63-4868;² and

¹ *Deposition Of Anthony Olenichak* (Feb. 9, 2012); *Volume II - Continued Deposition Of Anthony Olenichek* (Mar. 21, 2012).

² The "Related Documents" can be accessed by visiting the "IDWR Water Right And Adjudication Search" page at <http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp>, entering the first two digits of the water right number

- (d) The annual watermaster reports (“Black Books”) for Water District No. 1 (formerly Water District No. 36), Water District No. 63, and Water District No. 65.³

The information sought by this Interrogatory may be ascertained from these documents and/or communications, which are either already in possession of A&B Irrigation District or its attorneys, or are public documents equally available to A&B Irrigation District as to the State of Idaho. Additional documents and/or “communications” that may be “relevant” and offered into evidence at trial are produced herewith. I.R.C.P. 33(c).

INTERROGATORY NO. 8: Please identify each person with whom you or your representatives have communicated or who you or your representatives have interviewed seeking information relating to your objections and/or responses or any issue addressed in your objections and/or responses.

ANSWER TO INTERROGATORY NO. 8: The State objects to this Interrogatory’s use of the terms “communicated,” “interviewed” and “seeking information” as vague and ambiguous, and also objects to this Interrogatory to the extent it seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, the State answers as follows. As discussed in the State’s response to Interrogatory No. 2, the issues of hydropower subordination and the Idaho Power Company contracts have been resolved and are no longer at issue in these subcases, and the title ownership issue is not a factual matter but rather a legal question to be resolved under *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007). The State identifies the following as persons with whom the State has “communicated,” or whom the State has “interviewed,” for the purpose of “seeking information,” within the State’s understanding of the intended meaning of those terms as used in this Interrogatory:

in the “Basin” field and the last four digits in the “Sequence” field, and then clicking the “Search” button. The search results will include a button for the “Related Documents.”

³ The annual watermaster reports for Water District No. 1, Water District No. 63 and Water District No. 65 are available at the Department’s state office, located at in the Idaho Water Center, 322 East Front Street, Boise, Idaho. The Water District No. 1 reports are also available on the Department’s website, under “Water District Records Search” at <http://www.idwr.idaho.gov/WaterManagement/WaterDistricts/default.htm>, by entering “01” for the district and then entering the year of interest. The Water District No. 01 annual reports are also available in the Water District No. 1 office at 900 North Skyline Road, Suite A, Idaho Falls, Idaho.

Anthony Olenichak
Program Manager
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Ron Shurtleff
Watermaster, Water District No. 65
102 N. Main
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Elizabeth Ann Cresto
Technical Hydrologist
Idaho Department of Water Resources
322 East Front Street
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Boise, Idaho 83720-0098
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INTERROGATORY NO. 9: Please separately identify each exhibit which you may offer into evidence at the trial of this action and as to each such exhibit which consists of more than 15 pages or more than 3,000 words, quote or otherwise specifically designate each portion of such exhibit which you contend is the relevant portions thereof.

ANSWER TO INTERROGATORY NO. 9: The State objects to this Interrogatory as overbroad and unduly burdensome, and to the extent it combines several separate interrogatories. I.R.C.P. 33(a)(3). Without waiving these objections, the State answers as follows. The State has not yet identified the exhibits it may offer into evidence at trial, and cannot do so until the issues to be decided at trial are identified, which depends in part upon resolution of the pending motions for summary judgment and the pending petition to designate Basin-Wide Issue No. 17. The State further objects to this Interrogatory as overbroad and unduly burdensome, vague and ambiguous, calling for legal conclusions, and seeking confidential attorney work product insofar as it seeks designation of quotations or portions of potential exhibits that are "relevant." Without waiving these objections, the State incorporates by this reference its answer to Interrogatory No. 7, including the documents and/or "communications" specified therein and/or provided on the computer disks enclosed herewith. I.R.C.P. 33(c).

INTERROGATORY NO. 10: Please describe, in narrative format, the basis for your Objections to the Director's Reports for the water rights. Your narrative should include an identification of

all documents, memoranda and/or other tangible items, regardless of format, which you believe support your Objections.

ANSWER TO INTERROGATORY NO. 10: The State objects to this Interrogatory's request for a "narrative" as vague and ambiguous. The State also objects to this Interrogatory as overbroad and unduly burdensome, and to the extent it combines several separate interrogatories. I.R.C.P. 33(a)(3). The State also objects to this Interrogatory to the extent it seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, the State answers as follows. The issues identified in the State's objections regarding hydropower subordination and Idaho Power Company contracts have been resolved and are no longer at issue in these subcases. Further, the title ownership issue is not a factual matter but rather a legal question to be resolved under *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007). The basis of the State's objection regarding title ownership was that the *Pioneer* decision is controlling authority as to the title ownership issue in these subcases.

INTERROGATORY NO. 11: Please describe, in narrative format, the basis for your Responses to any objections to the water rights. Your narrative should include an identification of all documents, memoranda and/or other tangible items, regardless of format, which you believe support your Responses.

ANSWER TO INTERROGATORY NO. 11: The State objects to this Interrogatory's request for a "narrative" as vague and ambiguous. The State also objects to this Interrogatory as overbroad and unduly burdensome, and to the extent it combines several separate interrogatories. I.R.C.P. 33(a)(3). The State also objects to this Interrogatory to the extent it seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, the State answers as follows. To the extent the objections to which the State responded raised the issues of hydropower subordination and Idaho Power Company contracts, those questions have been resolved and are no longer at issue in these subcases. Further, the title ownership issue is not a factual matter but rather a legal question to be resolved under *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007). The basis of the State's objection regarding title ownership was that the *Pioneer* decision is controlling authority as to the title ownership issue in these subcases.

The basis for the State's responses to other parties' objections in these subcases was to provide notice to the Court and the parties that the State desired to participate in the proceedings on the objections to which the State responded. To the extent this Interrogatory seeks a description of the basis for the State's position on the issues raised by the objections to which the State responded, the State incorporates herein by this reference its objections and answers to Interrogatory No. 3. Without waiving these objections, the State also incorporates herein by this reference the State's briefing in support of the State's pending summary judgment motion, the State's briefing in response to the Surface Water Coalition's pending summary judgment motion, and the State's briefing in response to the recent amicus motion filed in these subcases.⁴ To the extent this Interrogatory seeks identification of the documents which the State believes support its positions on the issues raised by the objections to which the State responded, the State incorporates herein by this reference its answer to Interrogatory No. 7, including the documents specified therein and/or provided on the computer disks enclosed herewith. I.R.C.P. 33(c).

INTERROGATORY NO. 12: You have asserted that the water rights should not be permitted to "refill" in priority after water has been released for operational purposes such as flood control. Since the purpose of use for these water rights does not include these operational releases, please describe, in full and complete detail, the basis for your assertion that water released for these purposes should be counted against the water rights' total volume for purposes of administration.

ANSWER TO INTERROGATORY NO. 12: The State objects to this Interrogatory as mischaracterizing the State's position and ascribing to the State a definition of the term "refill" that the State has not adopted for purposes of these subcases. The State also objects to this Interrogatory to the extent it combines several separate interrogatories. I.R.C.P. 33(a)(3). Without waiving these objections, the State answers that under Idaho law the water rights to divert natural flow into the American Falls and Palisades Reservoirs are not administered on the basis of releases from the reservoirs.

INTERROGATORY NO. 13: You have asserted that water right 1-2064 should be limited to an annual diversion of 1,700,000 acre-feet. Please describe, in full and complete detail, the basis for

⁴ *Memorandum In Support Of State Of Idaho's Motion For Partial Summary Judgment* (Feb. 21, 2012); *State Of Idaho's Response To Surface Water Coalition's Motion For Partial Summary Judgment* (Jun. 8, 2012); *State Of Idaho's Response To Motion For Leave To File Amicus Brief* (Jun. 19, 2012).

your assertion that water stored and carried over from a prior year should be included in the annual diversion volume. In other words, why should last year's diversion into storage count towards this year's diversion into storage for purposes of water right administration?

ANSWER TO INTERROGATORY NO. 13: The State objects to this Interrogatory to the extent it combines several separate interrogatories. I.R.C.P. 33(a)(3). The State also objects to this Interrogatory as mischaracterizing the State's position because the State has not asserted in these subcases that "water stored and carried over from a prior year should be included in the annual diversion volume." The State further objects to this Interrogatory as seeking information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence, because the accounting for "water stored and carried over from a prior year" is not an element of a water right.

INTERROGATORY NO. 14: You have asserted that water right 1-2068 should be limited to an annual diversion of 1,200,000 acre-feet. Please describe, in full and complete detail, the basis for your assertion that water stored and carried over from a prior year should be included in the annual diversion volume. In other words, why should last year's diversion into storage count towards this year's diversion into storage for purposes of water right administration?

ANSWER TO INTERROGATORY NO. 14: The State objects to this Interrogatory to the extent it combines several separate interrogatories. I.R.C.P. 33(a)(3). The State objects to this Interrogatory as mischaracterizing the State's position because the State has not asserted in these subcases that "water stored and carried over from a prior year should be included in the annual diversion volume." The State further objects to this Interrogatory to the extent it seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence, because the accounting for "water stored and carried over from a prior year" is not an element of a water right.

INTERROGATORY NO. 15: You have proposed that the following remark be included on the water rights:

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

Please describe, in full and complete detail, the following:

- a. How you define the term “additional water” or “additional storage.”
- b. How you define the term “incidental” and the basis for your contention that “additional water” or “additional storage” should be considered “incidental.”
- c. Please identify any documents or other information identifying the right to store “additional water” or “additional storage” as being “incidental.”
- d. The basis for your contention that “additional water” or “additional storage” should be considered “subordinate to all existing ... water rights.”
- e. The basis for your contention that “additional water” or “additional storage” should be considered “subordinate to all ... future water rights.”

ANSWER TO INTERROGATORY NO. 15: The State objects to this Interrogatory as combining several separate interrogatories. I.R.C.P. 33(a)(3). Without waiving this objection, the State answers as follows:

- a. The term “additional water” as used in the referenced remark refers to the water that may be diverted into and/or stored in the American Falls reservoir or the Palisades reservoir after the total quantity of water that has accumulated to storage under the applicable water right – water right no. 01-2064 for American Falls; water right no. 01-2068 for Palisades – equals the decreed quantity;
- b. The term “incidental” means the “additional water” is allocated according to Water District No. 1 administrative practices and procedures;
- c. The State objects to the use of the term “identifying” in this Interrogatory subpart as vague and ambiguous, and further objects that this subpart mischaracterizes the State’s position as being there is a separate “right” to store “additional water” rather than that storing “additional water” under the applicable water right – water right no. 01-2064 for American Falls; water right no. 01-2068 for Palisades – is allowed even after the total quantity of water that has accumulated to storage equals the decreed quantity. Without waiving this objection, the State answers that the following documents support the State’s position that the “additional water” is allocated according to Water District No. 1

administrative practices and procedures: the annual reports for Water District No. 1,⁵ the documents provided in the “Interrogatory 15” folder on the computer disks produced herewith, and also the other documents specified in the State’s responses to these Interrogatories and/or produced on the computer disks enclosed herewith.

d. The basis for the State’s position that “additional storage” should be considered “subordinate to all existing . . . water rights” is described in the State’s briefing in support of the State’s currently pending motion for partial summary judgment and the State’s briefing in response to the recent amicus motion filed in these subcases, and which are incorporated into this answer by this reference.⁶

e. The basis for the State’s position that “additional storage” should be considered “subordinate to all . . . future water rights” is described in the State’s briefing in support of the State’s currently pending motion for partial summary judgment and the State’s briefing in response to the recent amicus motion filed in these subcases, and which are incorporated into this answer by this reference.⁷

INTERROGATORY NO. 16: In his deposition in this matter, TONY OLENICHAK testified that “Prior to 1978,” the Water District 01 watermasters “gave credit to the American Falls spaceholders for a refill.” *Deposition of Anthony Olenichak*, Vol. II, at 255 & 274-75 (testifying that American Falls Reservoir was “refilled prior to fill of the junior accounts in Palisades”). As to this testimony, please describe, in full and complete detail, the following:

a. If you disagree, either in whole or in part, with this testimony, please describe the basis for your disagreement and identify any documents or other information that you claim support your disagreement with this testimony.

b. If you agree this testimony, either in whole or in part, please describe the basis for your contention that all refill must be “subordinate to all existing and future water right,” even though the reservoirs were allowed to refill prior to 1978.

⁵ The annual reports for Water District No. 1 are available at the Department’s state office in Boise, at the Water District No. 1 office in Idaho Falls, and on the Department’s website. *See supra* note 3.

⁶ *Memorandum In Support Of State Of Idaho’s Motion For Partial Summary Judgment* (Feb. 21, 2012); *State Of Idaho’s Response To Motion For Leave To File Amicus Brief* (Jun. 19, 2012).

⁷ *Memorandum In Support Of State Of Idaho’s Motion For Partial Summary Judgment* (Feb. 21, 2012); *State Of Idaho’s Response To Motion For Leave To File Amicus Brief* (Jun. 19, 2012).

c. In light of TONY OLENICHAK's testimony that storage rights were refilled prior to 1978, could the storage reservoirs refill under a priority date that is junior to the original fill priority date but still prior to 1978? Please explain your answer in full and complete detail, including identification of any documents or information that you claim supports your answer.

ANSWER TO INTERROGATORY NO. 16: The State objects to this Interrogatory as combining several separate interrogatories. I.R.C.P. 33(a)(3). The State also objects that this Interrogatory mischaracterizes Mr. Olenichak's testimony by selectively quoting and combining portions of separate statements on the cited pages of the transcript of Mr. Olenichak's deposition, and by omitting other statements on the same pages. Without waiving these objections, the State answers as follows:

a. Mr. Olenichak's testimony speaks for itself. The State agrees that the cited transcript pages correctly record Mr. Olenichak's testimony, but the State does not agree with this Interrogatory's characterization of the substantive content or intent of his testimony. The document that the State believes support its disagreement with this Interrogatory's characterization of Mr. Olenichak's testimony is the deposition transcript and the exhibits appended thereto, which are already in the possession of A&B Irrigation District and/or its attorneys.

b. The State objects to this Interrogatory subpart as mischaracterizing the State's position and ascribing to the State a definition of the term "refill" that the State has not adopted for purposes of these subcases. Without waiving this objection, the State answers as follows. Mr. Olenichak's testimony speaks for itself. The State agrees that the cited transcript pages correctly record Mr. Olenichak's testimony, and asserts that in other pages of the transcript Mr. Olenichak testified the State's proposed remark is consistent with water rights administration in Water District No. 1. Further, there is no inconsistency between the State's proposed remark and this subpart's assertion that "the reservoirs were allowed to refill prior to 1978."

c. The State objects to this Interrogatory subpart to the extent it mischaracterizes Mr. Olenichak's testimony, which speaks for itself. The State also objects to this Interrogatory as vague and ambiguous, calling for speculation, calling for legal conclusions, and seeking information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence to the extent it asks the State to opine on a

hypothetical priority date that has not been recommended or sought in these subcases. Without waiving these objections, the State answers as follows. The State agrees that the cited transcript pages correctly record Mr. Olenichak's testimony, but the State does not agree with this subpart's characterization of the substantive content or intent of his testimony. The documents the State believes support its disagreement with this subpart's characterization of Mr. Olenichak's testimony is the deposition transcript and the exhibits appended thereto, which are already in the possession of A&B Irrigation District and/or its attorneys. Further, the legal question of whether American Falls reservoir (or the Palisades reservoir) "could" at some future time "refill" (as the term "refill" is defined in A&B Irrigation District First Set Of Discovery Requests) under a priority date junior to the priority date recommended in Subcase No. 01-2064 (or Subcase No. 01-2068, as to Palisades) would depend on whether there was a valid state water right(s) authorizing diversions of natural flow into the reservoir(s) under the hypothetical priority dates postulated by this Interrogatory. The State is not aware of any such water rights.

INTERROGATORY NO. 17: If you contend that storage rights in Idaho are only entitled to "fill" one time during the authorized season of use (in this case January 1st through December 31st), please describe, in full and complete detail, the basis for your assertion.

ANSWER TO INTERROGATORY NO. 17: The State objects to this Interrogatory as combining several separate interrogatories. I.R.C.P. 33(a)(3). The State also objects to this Interrogatory's reference to "fill" as vague and ambiguous. Without waiving these objections, the State answers as follows. The State contends that a water right to divert the public waters of the state in priority is limited to the quantity of water set forth in the quantity element of the water right, that this legal principle applies to the water rights claimed in Subcase Nos. 01-2064 and 01-2068, and that additional water may be diverted into and stored in the reservoirs provided no other water rights are injured thereby. The basis for the State's position is described in the State's briefing in support of its currently pending motion for partial summary judgment and the State's briefing in response to the recent amicus motion filed in these subcases, and which are incorporated into this answer by this reference.⁸

⁸ *Memorandum In Support Of State Of Idaho's Motion For Partial Summary Judgment* (Feb. 21, 2012); *State Of Idaho's Response To Motion For Leave To File Amicus Brief* (Jun. 19, 2012).

INTERROGATORY NO. 18: If the answers to *Requests for Admission Nos. 1 to 8* are anything other than an unqualified "admit":

- (1) Identify and describe in detail the facts upon which you rely in making your response;
- (2) identify all individual(s) with knowledge regarding any such facts;
- (3) Identify all documents relating in any way to your response(s); and
- (4) Identify any witnesses and exhibits upon which you intend to rely to support your responses.

ANSWER TO INTERROGATORY NO. 18: The State objects to this Interrogatory as combining several separate interrogatories. I.R.C.P. 33(a)(3). Without waiving this or any other objection, the State answers this Interrogatory, as applicable, in the State's responses to A&B Irrigation District's Requests For Admission.

RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Please produce all reports, correspondence, photographs, memoranda, records and all other documents that support your answers to Interrogatory Nos. 1 through 18.

ANSWER TO REQUEST FOR PRODUCTION NO. 1: The State objects to this Request For Production to the extent it seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. *See supra* Answers to Interrogatories Nos. 2, 3, 8, 10 and 11. Without waiving these objections, the State incorporates by this reference its answers to Interrogatory Nos. 7, 9, 11, 15, 16 and 17, including the documents specified therein and/or provided on the computer disks enclosed herewith.

REQUEST FOR PRODUCTION NO. 2: Please produce all reports, correspondence, photographs, memoranda, records and all other documents relied upon by you or your agents to respond to Interrogatory Nos. 1 through 18 excluding only those documents which you contend are protected by a privilege.

ANSWER TO REQUEST FOR PRODUCTION NO. 2: The State objects to this Request For Production as vague and ambiguous to the extent it seeks the same information sought by Request For Production No. 1. Without waiving this objection, the State incorporates by this

reference its objections and response to Request For Production No. 1. The privilege log is appended to these responses.

REQUEST FOR PRODUCTION NO. 3: Please produce copies of all documents and exhibits that you intend to offer as evidence at the trial of this matter.

ANSWER TO REQUEST FOR PRODUCTION NO. 3: The State objects to this Request For Production as vague and ambiguous, and as overbroad an unduly burdensome, because until the pending summary judgment motions are and the pending petition for designation of Basin-Wide Issue No. 17 are resolved, the State cannot determine which documents and exhibits it intends to offer as evidence at trial. Without waiving this objection, the State responds by incorporating herein by this reference its objections and responses to Request For Production No. 1.

REQUEST FOR PRODUCTION NO. 4: Please produce copies of any statements which your witnesses will use, or you anticipate may be used, to refresh their memory, either for deposition or trial.

ANSWER TO REQUEST FOR PRODUCTION NO. 4: The State has not determined which witnesses it will use and therefore cannot determine what statements, if any, such witnesses might use to refresh their memories. If Mr. Olenichak testifies, he may use copies of his deposition transcript and/or exhibits in this matter to refresh his memory. If Mr. Barrie, Mr. Shurtleff or Ms. Cresto testify, they may use copies of their affidavits filed in this matter to refresh their memories. A&B Irrigation District and/or its attorneys are already in possession of these materials. While the State is unaware at this time of other statements these potential witnesses might use to refresh their memories, additional such statements may be discovered or identified in the future.

REQUEST FOR PRODUCTION NO. 5: Please produce copies of any and all written reports or documents of any kind whatsoever generated, relied upon, reviewed or possessed by expert witnesses of any type retained by you to review or analyze this matter and/or render expert testimony.

ANSWER TO REQUEST FOR PRODUCTION NO. 5: The State objects that this Request For Production seeks information that is not discoverable under I.R.C.P. 26(b)(4)(B). Without

waiving this objection, the State responds as follows. The State has not retained any expert witnesses who are expected to testify at trial. If in the future the State retains any expert witnesses who are expected to testify at trial, the State will produce any report generated by such expert witness and any data or other information considered by the expert witness in accordance with the Idaho Rules of Civil Procedure and the Court's orders.

REQUEST FOR PRODUCTION NO. 6: Please produce the current resume and/or curriculum vitae of all expert witnesses or consultants with whom you have consulted.

ANSWER TO REQUEST FOR PRODUCTION NO. 6: The State objects that this Request For Production seeks information that is not discoverable under I.R.C.P. 26(b)(4)(B). Without waiving this objection, the State responds as follows. The State has not retained any expert witnesses who are expected to testify at trial. If in the future the State retains any expert witnesses who are expected to testify at trial, the State will produce any report generated by such expert witness and any data or other information considered by the expert witness in accordance with the Idaho Rules of Civil Procedure and the Court's orders.

REQUEST FOR PRODUCTION NO. 7: Please produce copies of any notes, memoranda, letters or other correspondence prepared by you or between you and any other individual or entity, including the Idaho Department of Water Resources and its attorneys, regarding the issues raised through your Objections and/or Responses to the water rights.

ANSWER TO REQUEST FOR PRODUCTION NO. 7: The State objects to this Request For Production to the extent it seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence, and as vague and ambiguous, and also to the extent it seeks information protected from disclosure by the attorney work-product doctrine or the attorney-client privilege. Without waiving these objections the State responds as follows. The issues identified in the State's objections regarding hydropower subordination and Idaho Power Company contracts have been resolved and are no longer at issue in these subcases. Further, the State's responses to other parties' objections did not raise any issues but simply notified the Court and the parties that the State desired to participate in the proceedings on the objections to which the State responded. The objections to which the State responded generally consisted of little more than "checked" boxes on the Standard Form 1 form, and in such cases the State

cannot be sure what specific issues the objectors intended to raise, and for this reason the State is also unable to determine what information this Request For Production seeks with respect to the State's responses. In a good faith effort to respond to this Request For Production, the State provides documents that may be responsive to this Request For Production in the folder entitled "Request for Production 7" on the enclosed computer disks

REQUEST FOR PRODUCTION NO. 8: Please produce copies of any notes, memoranda, letters or other correspondence prepared by you or between you and the Idaho Department of Water Resources and its attorneys, regarding the water rights.

ANSWER TO REQUEST FOR PRODUCTION NO. 8: The State incorporates herein by this reference its objections and responses to Request For Production No. 7.

REQUEST FOR PRODUCTION NO. 9: Please produce copies of any notes, memoranda, letters or other correspondence prepared by you or between you and Water District 01, regarding the water rights.

ANSWER TO REQUEST FOR PRODUCTION NO. 9: The State objects to this Request For Production as vague and ambiguous, and also as overbroad and unduly burdensome, to the extent it is not limited to relatively recent events or to the current litigation and therefore may encompass all such historic and/or archived documents. Without waiving these objections, the State responds as follows. Many of the documents potentially responsive to this Request for Production were recently reviewed by counsel for A&B Irrigation District when Water District No. 1 recently provided counsel the opportunity to review Water District No. 01's archived documents and provided copies of any such documents that counsel requested to be copied. The State also incorporates herein by this reference its responses to Requests For Production No. 1 and Request For Production No. 7.

REQUEST FOR PRODUCTION NO. 10: Please produce any other documents, not identified above, which you believe supports your Objections and/or Responses to the water rights.

ANSWER TO REQUEST FOR PRODUCTION NO. 10: The State incorporates herein by this reference its objections and responses to Request For Production No. 7. Without waiving these objections, the State responds that its responses to the above Interrogatories and Requests For

Production include the documents the State has identified to date as potentially relevant to the issues that remain to be resolved in these subcases.

REQUEST FOR PRODUCTION NO. 11: For any documents withheld from production under a claim of privilege, please produce a privilege log in conformance with Idaho Rule of Civil Procedure 26(b)(5)(A).

ANSWER TO REQUEST FOR PRODUCTION NO. 11: A privilege log is appended to these responses.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Please admit that the State of Idaho, in its capacity participating in these subcases, does not own any storage space in any reservoir in Water District 01, including American Falls and Palisades Reservoirs.

ANSWER TO REQUEST FOR ADMISSION NO. 1: The State objects to use of the term “own” any storage space in any reservoir as this Request For Admission as vague and ambiguous. Without waiving this objection, the State denies this Request for Admission. The State, through the Idaho Water Resource Board, has rights to storage at Palisades Reservoir under Contract No. 14-06-100-1836, pursuant to an assignment of that contract to the State by FMC Corporation.

REQUEST FOR ADMISSION NO. 2: Please admit that the State of Idaho, in its capacity participating in these subcases, does not have any contracts with the United States Bureau of Reclamation to receive water stored under water rights 1-2064 or 1-2068.

ANSWER TO REQUEST FOR ADMISSION NO. 2: Denied. The State, through the Idaho Water Resource Board, has rights to storage at Palisades Reservoir under Contract No. 14-06-100-1836, pursuant to an assignment of that contract to the State by FMC Corporation. PART 4

REQUEST FOR ADMISSION NO. 3: Please admit that the State of Idaho, in its capacity participating in these subcases, does not own any natural flow water rights subject to administration by Water District 01.

ANSWER TO REQUEST FOR ADMISSION NO. 3: Denied. Included on the computer disks enclosed herewith (in the folder entitled "Request for Production No. 7") is a list of natural flow water rights owned by the State that are subject to administration by Water District No. 1. The State is unsure at this time if this is a complete or exhaustive list of such water rights.

REQUEST FOR ADMISSION NO. 4: Please admit that the storage water rights, as licensed by the Idaho Department of Water Resources, do not contain the remark requested by the State of Idaho referenced in its *Motion for Partial Summary Judgment* filed on January 25, 2012:

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

ANSWER TO REQUEST FOR ADMISSION NO. 4: Admitted.

REQUEST FOR ADMISSION NO. 5: Please admit that the storage water rights, as recommended by the Idaho Department of Water Resources to the SRBA Court, do not contain the remark requested by the State of Idaho referenced in its *Motion for Partial Summary Judgment* filed on January 25, 2012:

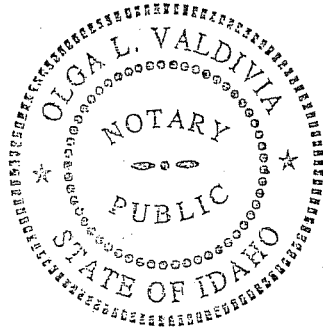
This right is filled for a given irrigation season when the total quantity of water that has accumulated to storage under this right equals the decreed quantity.
Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water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

ANSWER TO REQUEST FOR ADMISSION NO. 5: Admitted.

REQUEST FOR ADMISSION NO. 6: Please admit administration of the storage water rights prior to 1970 did not subordinate "refill" of the rights to "all existing and future water rights."

ANSWER TO REQUEST FOR ADMISSION NO. 6: Denied. As discussed on pages 20-29 of the *Memorandum In Support Of State Of Idaho's Motion For Partial Summary Judgment* (Feb. 21, 2012), which is incorporated herein by this reference, prior to 1970 the quantity of water that the Bureau was entitled to divert in priority under the water rights for American Falls and Palisades was limited to the decreed quantity, although there were a few exceptions.

SUBSCRIBED AND SWORN to before me this 24 day of June 2012.



[Signature]
Notary Public for Idaho
Residing at: Boise, ID
My commission expires: 2/5/2018

ATTACHMENT A

01-02064
01-02064A
01-02064E
01-02064F
01-02064L
01-10042
01-10042A
01-10042B
01-10053A
01-10190
(American Falls Subcases)

01-02068
01-02068D
01-02068E
01-02068F
01-02068M
01-02068Y
01-10043
01-10043A
01-10043E
01-10191
01-10389
(Palisades Subcases)

Privilege Log - State's Responses to A&B Irrigation District's Requests (Jun. 25, 2012)

BATES	DATE	DESCRIPTION	
IAGO-06-0007-016270	May 5, 2010	E-mail between State's counsel	WP
IAGO-06-0007-016481	Oct. 6, 2010	Historic Data Analysis	WP; IRCP 26(b)(4)(B)
IAGO-06-0007-16505	Oct. 15, 2010	E-mail between State's counsel	WP
IAGO-06-0007-16533		Duplicate of above	WP
IAGO-06-0007-016093	Nov. 18, 2010	E-mail between State's counsel	WP
IAGO-06-0007-016531	Nov. 18, 2010	E-mail between State's counsel	WP
IAGO-06-0007-017135	Jan. 30, 2012	E-mail from consultant to State's counsel	WP; IRCP 26(b)(4)(B)
IAGO-06-0007-017178	May 11, 2012	E-mail from consultant to State's counsel	WP; IRCP 26(b)(4)(B)
IAGO-06-0007-017223	May 29, 2012	E-mail from consultant to State's counsel	WP; IRCP 26(b)(4)(B)
IAGO-06-0007-017225	Jun. 11, 2012	E-mail from consultant to State's counsel	WP; IRCP 26(b)(4)(B)

Notes:

WP = Attorney Work Product Doctrine

IRCP 26(b)(4)(B) = Not discoverable pursuant to Rule 26(b)(4)(B)

AC = Privileged Attorney-Client Communication